Supreme Court, U.S.
FILED
981429 FEB 4 - 1999
OFFICE OF THE CLERK

No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

JOHN L. HAMILTON, and
HAMILTON BOGARTS, INC., et al

Petitioner,

v.

LARRY ROBERTS, PHILLIP ARTHURHULTZ,
MAXINE L. PERRY, et al

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

John E. Thomas (P21378)
Attorney for Petitioner
711 W. Ann Arbor Trail
Plymouth MI 48170-1677
734-455-4560

10pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the word "simulates", as used in Michigan Liquor Control Commission Rule 436.1411, which states, in pertinent part:

> "An on premises licensee shall not allow in or upon the licensed premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus",

as it relates to modern dance and artistic expression, is so subjective and without standards and guidelines so as to be unconstitutionally vague and overly broad and where it is alleged that the Regulation is applied in a discriminatory manner, gender and institutionally, whether those allegations must be accepted as true when not rebutted by affidavit and summary judgment denied?

II. Whether Federal Rule of Civil Procedure, Rule 56(f), was intended to require a plaintiff to file an affidavit to justify claims of conspiracy by governmental officials to divest him of his property and of discriminatory application of Michigan Liquor Commission Rule 436.1411 where defendants had not established the lack of a genuine issue of material fact and where the District Court knew that no discovery had occurred and had expressly not permitted discovery?

III. Whether the District Court and the 6th Circuit Court of Appeals erred in granting summary judgment on claims that a state regulatory rule was void for vagueness, overly broad, and discriminatorily applied, contrary to

the 14th Amendment and to claims of conspiracy to force plaintiff out of business, contrary to 42 USC 1983?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Parties to the appeal in the US District Court Eastern District of Michigan Southern Division and 6th Circuit Court of Appeals were:

John Hamilton, Appellant
Hamilton Bogarts, Inc., Appellant
Jo-Bet, Inc., Appellant

Phillip Arthurhultz, Appellee)Also known as/
Maxine L. Perry, Appellee)Michigan Liquor
Seymour S. Podolsky, Appellee)Control Defendants
Betty E. Pulliam, Appellee)
Jacquelyn A. Stewart, Appellee)
Unknown Michigan Liquor Control
Enforcement Agents, Appellee)

Larry Roberts, Appellee
Edward Carravallah, Appellee
Unknown Wayne County Deputy Sheriffs, Appellee
Ronald Sweatt, Appellee
Lydia Sweatt, Appellee
Unknown Officers and Employees of Farvway, Inc., Appellee

TABLE OF CONTENTS

Question Presented for Review ..... i,ii
List of Parties to the Proceedings in the Court Below ... iii
Table of Contents- Appendix v
Table of Authorities ..... vi, vii, viii
Citations of Official and Unofficial Opinions and Orders Entered in the Case ix
Statement of Jurisdiction ix
Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved x
Statement of Case 1
District Court Summary Judgment 2
Sixth Circuit Court of Appeals 8
Reasons for Granting Writ 10
Conclusion 23
Appendix 1a-67a

TABLE OF CONTENTS - APPENDIX

A. Order Filed November 6, 1998 . . . . . 1a

B. Sept 10, 1998 Opinion 6th Circuit Court of Appeals . . 2a

C. Order Granting Defendants' Motions for Summary Judgment 17a

D. Judgment 29a

E. First Amended Verified Complaint 30a

F. Verified Complaint 48a

G. Constitution of the United States
- First Amendment 62a
- Fourteenth Amendment 62a
- Twenty-First Amendment 62a

H. Federal Rules of Civil Procedure
- Rule 26(a) 64a
- Rule 26(f) 64a
- Rule 56 . . . . . 64a

I. Michigan Administrative Agency Rules R 431.1411 . 67a

TABLE OF AUTHORITIES

CASES:

Adickes v Kress & Co., 398 US 144, 26 L Ed 2d 142, 90 S. Ct. 1598 (1970) 21, 22
Anderson v Liberty Lobby, Inc., 477 US 242, 106 S. Ct 2505, 91 L Ed 2d 202 (1986) 23
Bargen v Dept. Of Defense, 623 F. Supp 290 (DC Nev, 1995) 17
Bechtler v Robinson, 886 F. 2d 644 (3rd Cir, 1989) 18
Benton-Volvo-Metairie Inc., v Volvo Southwest, Inc., 479 f 2d 135 (5th Cir 1973) 23
Bundo v City of Walled Lake, 395 Mich 679; 238 NW2d 154 (1976) 18
California v LaRue, 409 US 109; 93 S. Ct. 390; 34 L. Ed. 2d 342 (1972) 10, 13, 14
Canning v Star Publishing Co., 19 FRD 281 (DC Del, 1956) 21
Carey v Pipphus, 435 US 247; 55 L. Ed 252; 98 S. Ct. 1042 (1978) 20
Celotex Corp. v Catrett, 477 US 317, 323; 106 S. Ct. 2548, 2552; 91 L. Ed. 2d 265 (1986) 16
City of Heath, Ohio v Ashland Oil, Inc., 834 F. Supp 971 (SD Ohio, 1993) 18
Comfort v Town of Pittsfield, 924 F. Supp 1219 19
CPC Intern Inc. v Aerojet-General Corp., 731 F Supp 783 (WD Mich 1989) 18
Daniels v Williams, 474 US 327 (1986) 18
Doran v Salem Inn Inc., 422 US 922, 45 L. Ed 2d 648, 95 S. Ct 2561 (1975) 13
Ellison v Garbarino, 48 F 3d 192, 194 (6th Cir. 1995) 18
Frishett v State Farm Mut. Auto Ins. Co., 3 Mich App 688;

143 NW2d 19
Giaccio v Pennsylvania, 382 US 399, 402; 86 S.Ct. 518;
15 L. Ed. 2d 447 (1966) 16
Grayned v City of Rockford, 408 US 104, 92 S. Ct. 2294,
33 L. Ed. 2d 222 (1972) 15
Griswold v Connecticut, 381 US 479, 85 S. Ct. 1678,
14 L. Ed. 2d 510 (1965) 15
Hafer v Mello, 502 US 21; 112 S. Ct. 358;
116 L. Ed. 2d 301 (1991) 7
Hooks v Hooks, 771 F. 2d 935 (6th Cir. 1995) 19
Jackovich v General Adjustment Bureau, Inc.,
119 Mich App 221; 326 NW2d 458 (1982) 19
Joseph E. Seagram & Sons v Hostetter, 384 US 35, 52,
86 S. Ct 1254, 1264, 16 L. Ed 2d 336 (1966) 10
Kollenberg v Ramerez, 127 Mich App 345;
339 NW2d 176 (1983) 19
Lanzetta v New Jersey, 306 US 451, 453; 59 S. Ct. 618;
83 L. Ed. 888 (1939) 15
Leatherman v Tarrant County Narcotics Unit, 507 US 163;
122 L. Ed. 2d 515; 113 S. Ct. 1160 (1993) 17
Lewis v Dayton Hudson Corp. 128 Mich App 165;
339 NW2d 857 (1993) 19
Liffiton v Keuker, 850 F. 2d 73 (2nd Cir. 1998) 19
Memphis Light, Gas & Water Div. v Craft, 436 US 1;
56 L. Ed. 2d 30; 98 S. Ct. 1554 (1978) 20
Parratt v Taylor, 451 US 527, 535 (1981) 18
People v Smith, 75 Mich App 64; 254 NW2d 654 (1977) 15
Scheuer v Rhodes, 416 U.S. 232; 40 L. Ed. 2d 90; 94 S. Ct.
1683 (1974) 11, 15
Shelton v Tucker, 364 US 479, 81 S. Ct . 247,
5 L Ed 2 231 (1960) 15

Shuttlesworth v Birmingham, 394 US 147, 89 S. Ct 935,
22 L Ed 2d 162 (1969) 12, 13
Smith v Gogeun, 415 US 566, 572-573;
94 WS. Ct. 1242, 1246-1247; 39 L. Ed. 2d 605 (1974) . . 14
Vincent v Campbell County Fiscal Court, 820 F. 2d 194
(6th Cir. 1987) 20
Whites Landing Fisheries v Buckhholzer, 29 F 3d 229
(6th Cir. 1994) 17
Wynn v Morgan 861 F. Supp 622 (ED Tenn. 1994) 17
44 Liquor Mart v Rhode Island 517 US 484, 134 L Ed 2d 711,
116 S. Ct 1495 (1996) 14

STATUTES:
42 USC 1983 . . . . . 1,3,6, 7,9,17,19

RULES:
FEDERAL:
F.R.Civ. P. 12 (b)(6) 5,6
F. R. Civ P. 26(a) 21
F.R.Civ.P 26(f) 21
F.R.Civ. P. 56 2,6,9,10,20,21,22,23

MICHIGAN:
Michigan Liquor Control Regulation 436.1411 2,5,8,11
MISC:
United States Constitution
First Amendment 13
Fourteenth Amendment 13, 15
Twenty First Amendment 10
Websters Third New International Dictionary (1986) 8
Blacks Law Dictionary 8

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The Opinion of the 6th Circuit Court of Appeals was not reported and is reprinted in the Appendix at page 2a. The Order Denying Rehearing was not reported and appears in the Appendix at page 1a. The decision of the District Court Granting Summary Judgment was not reported and is found in the Appendix at page 16a.

STATEMENT OF JURISDICTION

The Opinion of the 6th Circuit Court of Appeals was entered on September 10, 1998 and rehearing en banc was denied November 6, 1998. Jurisdiction of this Court is invoked under 28 USC 1254 which permits review by this Court upon Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution
- **1st Amendment**
- **5th Amendment**
- **14th Amendment**

United States Statutes
- **42 USC 1983**

Federal Rules of Civil Procedure
- **12(b)(6)**
- **26(a)**
- **26(f)**
- **56**

Michigan Administrative Code Regulation
- **436.1411**

STATEMENT OF THE CASE

This is a case regarding a Michigan Liquor Control Regulation, similar in wording to that used in numerous other states including California, which Petitioners contend is unconstitutionally, vague and overly broad. It is, in part, about the application of the word "simulate", as it pertains to modern dance, artistic expression, free speech and gender discrimination. The Regulation prohibits liquor licensees from allowing a person, on premises, to simulate various sexual acts without setting forth definitions, standards or guidelines. It permits law enforcement officers sole discretion as to when a particular dance is merely artistic expression or people merely socializing and when the dance is "simulated" sex.

This case also involves Petitioners' 42 USC 1983 claim that certain public officials conspired to force him out of business because of his actions as a "whistle blower" and because he supported political opponents of Respondents. Although alleging that Respondents conspired and setting forth specific overt acts, which Respondents merely deny, Petitioner never had his day in court.

Petitioners were never permitted discovery before summary judgment was granted. The District Court granted summary disposition on both counts, for one set of reasons and the 6th Circuit Court of Appeals affirmed the trial court's grant of summary judgment for an entirely different set of reasons.

This is in part a case of first impression for this Court. After the Petitioners' Complaint was filed, Respondents moved for a stay of discovery and filed their Motions to Dismiss or for Summary Judgment. The 6th Circuit upheld summary judgment on the constitutionality of the Regulation because it held the term "simulate" to be self defining. It upheld summary judgment

on Petitioners' conspiracy civil rights allegations because Petitioners did not file an affidavit under Federal Rules of Civil Procedure Rule 56(f) setting forth why a continuance should be granted to allow discovery before summary judgment was decided.

The District Court was aware that discovery had not occurred and that it had pending before it a Motion to Stay Discovery, which the court did not address despite Petitioners' protestations. The District Court knew that discovery was not permissible until a discovery plan had been adopted under Federal Rules of Civil Procedure 26(f) and knew that the Respondents would not agree to any discovery until the Court had ruled on the Motion to Dismiss or Summary Judgment.

This Court has never addressed the application of Federal Rules of Civil Procedure Rule 56(f) and has not addressed the issue of what constitutes a "simulated" sexual act as it relates to modern dance, free speech, and artistic expression.

District Court Summary Judgment

Petitioners, John Hamilton ("Hamilton"), Jo-Bet, Inc. and Hamilton's Bogart, Inc., Michigan corporations owned by Hamilton, filed a Verified Complaint in the United States District Court for the Western District of Michigan seeking to have the Michigan Liquor Control Commission ("MLCC") Rule 436.1411, Michigan Administrative Code R 436.1411(1)(1980 AACS) declared "unconstitutional, a violation of the First Amendment of free speech, sexually discriminating, void for vagueness and overbreadth, and as applied to Bogarts and Jo-Bet, a denial of equal protection..."

Hamilton, individually, also alleged that Respondents: Wayne County Assistant Prosecutor Larry Roberts, Wayne

County Deputy Sheriff Edward Carravallah, unknown Wayne County Deputy Sheriffs, MLCC Commissioners or employees Philip Arthurhultz, Maxine Perry, Seymour Podolsky, Betty Pulliam, and Jacquelyn Stewart, (collectively "MLCC defendants") unknown MLCC enforcement agents, Ronald and Lydia Sweatt and Farvway, Inc., under color of law and in retaliation for Hamilton's support of the current Michigan Wayne County Prosecutor's political opponent, and "whistle blower" activities relating to the unethical conduct of a former assistant Michigan Attorney General assigned to the MLCC, agreed and conspired to deprive Hamilton of his property, deny him equal protection of the law and substantive and procedural due process in contravention of 42 USC 1983. The Sweatts and Farvway were added as defendants after the initial verified complaint was filed.

Hamilton alleged, in his complaint, that for the past 28 years, he has owned and operated, individually or jointly with his former wife, numerous bars and adult entertainment facilities in and about the metropolitan Detroit area under various licenses and permits issued by the MLCC without significant problems or disputes until a "whistle blowing" episode in 1991. Hamilton alleged that in 1991, in the course of a liquor control hearing, he caught an assistant attorney general instructing a defense witness not to appear and to avoid a subpoena. This misconduct was reported to the Office of the Attorney General. Thereafter, according to Hamilton's Complaint, his problems with the MLCC began.

Hamilton alleged that the MLCC Defendants in conjunction with the Assistant Attorney General agreed and conspired to deprive Hamilton of his liquor licenses and the ability to operate various bars and adult entertainment facilities.

According to Hamilton, the object of this conspiracy was to "show Hamilton who was boss". In an abuse of their public offices, the Commissioners engaged in a pattern of activity designed to drive Hamilton from business. The conspiracy to drive Hamilton from his business spread to Hamilton's family by refusing to issue liquor licenses to his sons merely because they were related to the father, and when the sons were finally granted licenses, they were prohibited from having contact with their father, even as a volunteer.

Hamilton, in his complaint, alleged that he politically opposed the election of Wayne County Prosecutor, John O'Hair and as a result, Respondent Larry Roberts joined the conspiracy and called a meeting of the unknown liquor control enforcement agents and Deputy Sheriff Carravallah, and instructed them to "shut the untouchable John Hamilton down by any means." Hamilton alleged that Roberts instructed the agents to write liquor control violations whether or not such violations existed and to manufacture legal proceedings against Hamilton in order to deprive him and his corporations of their liquor licenses.

Hamilton subsequently amended his complaint and added Ron and Lydia Sweatt and Farvway Inc. as additional defendants. Hamilton alleged that Roberts, as an overt act and in furtherance of the conspiracy, developed a relationship with Ron and Lydia Sweatt, competitors of Hamilton, to publicly harass Hamilton and to act as Roberts' agents in the creation of false allegations of liquor control violations. Hamilton further alleged that the Sweatts, acting under color of law and under the protection of Larry Roberts, "utilized the services of Farvway, Inc., a Michigan corporation, to act as an unlicensed, private investigator to: (1) spy on Hamilton; (2) to promote and solicit false allegations of liquor control violations; and (3) to

publically communicate false allegations against Hamilton and his businesses. Hamilton further alleged that Roberts knew or should have known that Farvway was not properly licensed to conduct private investigations or act as a private security agency and that Roberts, in furtherance of the conspiracy met with Sweatt and the officers and employees of Farvway to promote their unlawful activities.

Hamilton, in a subsequent count, and the two (2) corporations alleged that MLCC Regulation R 436.1411 was unconstitutionally vague. Specifically, the Petitioners alleged that the term "simulated" in the regulation lacked specificity. Hamilton alleged that the same conduct in two different liquor establishments, was treated differently by the MLCC and law enforcement officers. Petitioners alleged that the regulation lacked definition, standard and guidelines necessary for non discriminatory enforcement. Petitioners alleged that "simulated sexual intercourse" was not self defining in light of modern dance, customs and mores and that the regulation left enforcement to the discretion of individual officers and that actual discrimination in enforcement occurred regularly.

Respondents Roberts and Carravallah, in lieu of an answer, filed a Motion with Brief to Dismiss and to Stay Discovery, pursuant to F.R.Civ. P. 12(b)(6). Carravallah and Roberts claimed that Petitioners' complaint must be dismissed because Respondents were either absolutely or qualifiedly immune from litigation and because of the immunity question, discovery should be stayed. Respondents offered no affidavits or other documents in support of their motion, although Hamilton, et al, had filed a Verified Complaint.

Petitioners responded that Roberts, according to the Complaint, was not functioning as a prosecutor or in a

prosecutorial capacity but was functioning in an investigative and political capacity. Hamilton replied that qualified immunity is an affirmative defense which required factual findings and was therefore not a proper subject for a Rule 12(B)(6) motion. Further, Hamilton advised the court that Roberts-Carravallah's Motion was not timely.

In December, 1996, the MLCC Defendants filed a Motion for Summary Judgment, pursuant to F.R.Civ.P. 56. Attached to the Brief were a few documents which were unauthenticated and uncertified hearsay. No affidavits were attached to the Motion at that time.

The MLCC Defendants questioned whether they were "persons"within the meaning of 42 USC 1983. The MLCC Defendants, citing MCL 436.5, stated that they were functioning in their official capacities, although Hamilton, in his Complaint had alleged that they were functioning in their individual capacities.

The MLCC Defendants then shifted the argument from conspiracy to deprive Hamilton of his liquor license, to a question of whether Hamilton and his corporate entity, Jo-Bet, Inc., were accorded due process in the handling of the liquor control violations against Jo-Bet. They argued the State had an absolute right to impose penalties on Jo-Bet based on the Twenty-first Amendment of the United States Constitution.

Having asserted the Twenty-first Amendment claim, the MLCC Defendants argued that Hamilton and Jo-Bet were afforded equal protection. They further argued that the Verified Complaint was defective because it failed to "allege a specific wrongful act against each defendant" and that "stricter specificity in pleading is required where deprivation of constitutional rights are alleged."

Hamilton and his corporations responded to the Summary Judgment motion. Hamilton pointed out that the MLCC Defendants did not deny that they conspired to deprive Hamilton of his property.

Hamilton and the two corporations advised the district court that it did not question "the ability of the state to regulate public nudity" but, that the issue was "what is the definition of 'simulated' and whether that definition "was equally applied to all licensees."

Hamilton and his corporations filed a comprehensive Brief in Response addressing all of the issues raised by the MLCC Defendants. Hamilton noted under Hafer v Mello, 502 US 21; 112 S. Ct. 358; 116 L. Ed. 2d 301 (1991) that state officers may be held personally liable for damages under 42 USC 1983 based upon actions taken in their official capacities. Hamilton advised the court that the MLCC Defendants were not entitled to qualified immunity and that under Michigan law that a liquor licensee has a property interest in its license and permits and that the "disparity in treatment" by the MLCC Defendants was "evidence in support of Plaintiff's position that the Commission is conspiring to drive him out of business."

The MLCC Defendants filed a reply reasserting the positions taken in the initial brief but this time attaching their individual affidavits plus the Affidavit of Arthur D'Hondt. The affidavits were merely general denials of any personal knowledge of the allegations made by Hamilton.

In January, 1997, the MLCC Defendants supplemented their motions to dismiss and for summary judgment basically repeating and adopting their prior arguments. Correctly, they did point out that Hamilton's Complaint for 42 USC 1985 violation did not lie.

Five weeks later, in March, 1997, Roberts and Carravallah filed a "Notice of Concurrence in an Adoption of Motion to Dismiss." The Concurrence was one (1) page. At approximately the same time, Ron and Lydia Sweatt filed an answer and in April, 1997, in a terse concurrence, "joined in co-defendant's Motion for Summary Judgment and Supplemental Motion to Dismiss and for Summary Judgment." The Sweatts moved the court "to join in co-defendant's motion for summary judgment and supplemental motion to dismiss."

In May, 1997, the Honorable Barbara Hackett, United States District Court Judge, granted the Motion for Summary Judgment as to all Defendants and Hamilton appealed to the 6th Circuit Court of Appeals. Judge Hackett's decision is attached hereto as App.17a-28a.

Sixth Circuit Court of Appeals

A timely Claim of Appeal was filed with the 6th Circuit Court of Appeals. On September 10, 1998, the 6th Circuit affirmed the trial court's decision granting summary disposition.

As it pertained to Hamilton and the corporation's First Amendment argument regarding the constitutionality of MLCC Rule 436.1411, the 6th Circuit found that the District Court correctly granted summary judgment but for the wrong reason. **The Court held that the word "simulate" was "an understandable common term within the vocabulary of the average person, and a simple perusal through any dictionary would clear up any conceivable confusion." Further, the Court stated:**

> **WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) (1986) defines "simulate" as "to give the appearance or effect of : FEIGN, IMITATE." Similarly, BLACK'S LAW**

> **DICTIONARY defines "simulate: as "To assume the mere appearance of, without the reality;...feign; imitate; pretend." Thus, in even simpler terms, the rule prohibits licensees from having on their premises persons who pretend to actually perform sexual intercourse. If the rule were any more explicit, it would run the risk of itself being obscene.** (Emphasis added)

The court further stated that Hamilton and the corporations did not claim that the conduct performed by their dancers did "not simulate the performance of sexual intercourse."

The Court of Appeals also affirmed the district court's decision granting summary disposition as it pertained to Hamilton's 42 USC 1983 claims. The Court held that while it was "true that a grant of summary judgment may constitute an abuse of discretion where a non movant was not given sufficient opportunity to conduct discovery (cite omitted) ...where the appellant makes such a claim, the appellant must have complied with the strictures of Federal Rule of Civil Procedure 56(f)..." Because Hamilton did not comply with the strictures of Rule 56(f), the Court concluded that the district court had not abused its discretion in granting summary judgment **although no discovery was ever permitted by the district court.**

The Court of Appeals further concluded that Hamilton's 42 USC 1983 claims "revolve around an alleged conspiracy to run him out of business, but has completely failed to set forth any evidence demonstrating that a genuine issue of material fact with regard to the alleged conspiracy exists.

The Court of Appeals concluded that "Hamilton's complaint, although verified, contains almost exclusively

hearsay evidence and conclusory allegations." Therefore, Hamilton failed to present any evidence showing the existence of a conspiracy among the defendants and "the grant of summary judgment on that claim was proper."

REASON FOR GRANTING WRIT

There are several reasons for granting this Writ: (1) because this case has application in a majority of the states and involves a restraint on the First Amendment right of free speech; and (2) because it involves a first sense impression for this Court in the interpretation of Federal Rules of Civil Procedure Rule 56 (f) and its application where supplying the affidavit to request discovery would be an exercise in futility.

In a real sense, this case or one like it was predicted by Chief Justice Rehnquist in his opinion in California v LaRue, 409 US 109; 34 L. Ed. 2d 390; 93 S. Ct. 390 (1972). At footnote #5, Chief Justice Rehnquist wrote:

> Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in Joseph E. Seagram & Sons v Hostetter, 384 US 35, 52, 86 S. Ct 1254, 1264, 16 L. Ed 2d 336 (1966), is equally in point here: "**Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise**. We deal here only with the statute on its face. And we hold that so considered, the legislation is constitutionally valid. (Emphasis added.

LaRue addressed the issue of whether a state could regulate free speech as it pertained to activities in a licensed liquor

establishment.

This Court held under the 21st Amendment of the United States Constitution that the state had broad powers to control and limit activities on the premises of liquor establishments. The Court held that on its face a regulation, similar to the Michigan regulation, was valid and further held that there was a "...presumption in favor of the validity of the state regulation..." This Court did not address the standards or guidelines for the application of such a regulation nor did it attempt to define terms.

The regulation in question, Michigan Liquor Control Commission Rule R 436.1411, prohibits a person on licensed premises to simulate "performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus." (Apx 68a) Is eating a banana on stage simulated fellatio?

What was once called the "bump and grind" in the 20's, is now called the "flap", the "boogooloo" or some other dance name and can be seen on dance floors every night. There is "dirty dancing". There is "performance art". There is every sort of pelvic gyration or torso twisting conceivable. Are these "simulated sex acts" or freedom of expression?

This is not a question of regulation of"nude dancing." This is not a question of the state's ability to regulate activities on licensed premises that sell alcoholic beverages. This petition involves the definition of the word "simulate" as used in the context of modern dance and discriminatory application of the regulation. Under the rule, as applied without standards or guidelines, a topless dancer merely holding cigar could be in violation of the rule.

All well plead allegations must be accepted as true. Scheuer v Rhodes, 416 U.S. 232; 40 L. Ed. 2d 90; 94 S. Ct.

1683 (1974).In Petitioners' Complaint, Petitioners alleged that the same conduct in two or three different liquor licensed establishments would be treated differently. Petitioners alleged that the MLCC Defendants approved various forms of social dancing and interpersonal conduct in licensed liquor establishments other than topless bars but that the same act would constitute a liquor control violation in a topless bar. (App 45a)

Petitioners alleged that the MLCC Defendants instructed enforcement officers that "any physical movement that may be subject to multiple interpretation such as gyrating the pelvis or stroking an eight foot brass pole constitutes a simulated sexual act..." (App 45a-46a) Petitioners alleged that the MLCC Defendants stated that groin to groin contact between a man and a woman in a motion simulating sexual intercourse was permissible in licensed liquor establishments except in "topless bars." Petitioners further alleged that the same conduct that was prohibited by a female topless dancer was permitted for a male topless dancer, "sexually discriminating against the female performers renting" Petitioners' premises.

By granting summary judgment, Petitioners were never permitted to prove these allegation. They were denied their day in court.

Neither the District Court nor the Court of Appeals addressed the factual allegations. The allegations were never addressed by Respondents. Both courts ignored the fact that two (2) enforcement officers could see the same performance and arrive at different opinions and that in the absence of standards and guidelines, enforcement was left to the sole discretion of the officers.

In Shuttlesworth v Birmingham, 394 US 147, 89 S. Ct

935, 22 L Ed 2d 162 (1969) this Court stated:

> ...a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community.

Contrary to Shuttlesworth, the MLCC Defendants and the State of Michigan permit enforcement officers "to roam essentially at will, dispensing or withholding permission" on their personal whim, allowing the same identical conduct to performed in one bar and not another, by one dancer and not another, and by one gender and not another.

In Doran v Salem Inn Inc., 422 US 922, 45 L. Ed 2d 648, 95 S. Ct 2561 (1975), Chief Justice Rehnquist wrote:

> Although the customary "bar room" type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v LaRue, 409 US 109, 118, 34 L. Ed 2d 342, 93 S Ct 390 (1972) that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.

The dancers at Petitioners' establishments and Petitioners are in jeopardy of arrest or loss of license because at one time certain conduct is permissible and an hour later it may not be permissible, depending on the enforcement officer. Petitioners are entitled to the protections promised by this Court in Doran.

The 6th Circuit, in this case, held that the word "simulate" is self defining and unambiguous. The Court further stated that Petitioners did not deny that the dancers performed prohibited acts. If one does not know what is permitted and

what is not permitted, how does one deny performing an act? Petitioners deny that they have violated the Regulation but are unable to advise employees and independent contractors what conduct is permitted and what conduct is prohibited. If Elvis were still alive, could he perform in a bar in Michigan?

In 44 Liquor Mart v Rhode Island 517 US 484, 134 L Ed 2d 711, 116 S. Ct 1495 (1996), Mr. Justice Stevens noted that the free speech guarantee of the First Amendment was applicable to the states through the Fourteenth Amendment and that the Twenty-first Amendment did not license states to ignore their obligations under the First Amendment. This case modified LaRue, specifically holding that the "Twenty-first Amendment does not qualify the constitutional prohibition against laws bridging the freedom of speech embodied in the First Amendment."

A state regulation of dancers, be they topless or otherwise, without guidelines, definitions or standards, given the social mores of our time, prohibits free speech and artistic expression. An ambiguous regulation such as the regulation in question, prohibiting "simulated sexual intercourse, masturbation" etc., promotes a denial of equal protection through discriminatory enforcement.

Dancers in a bar, be they topless or fully dressed, are protected under the First Amendment as exercising free speech. Dance is, admittedly, a form of expression. "The prohibition against vague regulation of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement." Kollender v Lawson, 461 US 352; 357-358, 361; 103 S. Ct. 1855, 1858-1859, 1860; 75 L. Ed. 2d 903 (1983); Smith v Gogeun, 415 US 566, 572-573; 94 WS. Ct. 1242, 1246-1247; 39 L. Ed. 2d 605 (1974).

The penalty for violating the Regulation is possible loss of license or closing and/or a fine. The Regulation is quasi-criminal in its application. This Court must accept all well pled allegations as true. Scheuer, supra. A state regulation may be unconstitutionally vague because its coverage is over broad and impinges on First Amendment freedoms. Freedom of speech, freedom of association, are fundamental First Amendment rights. Griswold v Connecticut, 381 US 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), People v Smith, 75 Mich App 64; 254 NW2d 654 (1977). Once found to be fundamental, a right cannot be infringed by regulation if any "less drastic way of satisfying its intended purpose appears." Shelton v Tucker, 364 US 479, 81 S. Ct . 247, 5 L Ed 2 231 (1960). The due process clause of the 14th Amendment prohibits statutes, ordinance, or regulations that are void for vagueness. Grayned v City of Rockford, 408 US 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). In Grayned, the court noted that where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms" it "operates to inhibit the exercise of (those) freedoms."

A criminal or quasi-criminal statute or regulation such as the regulation in question does not provide fair notice of the conduct prescribed and confers on the enforcers and trier of fact unstructured and unlimited discretion to determine whether an offense has been committed. It has been held that a statute or regulation which either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess as to its meaning and differ as to its application, violation the first essential of due process of law. Lanzetta v New Jersey, 306 US 451, 453; 59 S. Ct. 618; 83 L. Ed. 888 (1939).

Under the Fourteenth Amendment a statute or

regulation is impermissibly vague where it delegates basic policy matters to police officers and judges for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application. Such action constitutes a violation of due process. Giaccio v Pennsylvania, 382 US 399, 402; 86 S.Ct. 518; 15 L. Ed. 2d 447 (1966). This is the essence of Appellants' action for declaratory judgment and Appellees do not deny that the Regulation delegates basic policy matters to enforcement officers and resolution is left, depending on the bar, to an ad hoc and subjective basis.

The discriminatory enforcement of the rule by Respondents establishes the ambiguity, but Petitioners were denied the opportunity to be heard. The term is not self defining and topless dancers are entitled to the same constitutional protection as their non topless counter parts.

Another reason for granting this Petition was the granting of summary judgment as it pertains to Petitioners' claim of Respondents' conspiracy to force him out of business. The party moving for summary judgment bears the initial responsibility of informing the court on the basis of its motion and identifying those portions of the record which demonstrate the absence of a material issue of fact. Celotex Corp. v Catrett, 477 US 317, 323; 106 S. Ct. 2548, 2552; 91 L. Ed. 2d 265 (1986). Thereafter, the nonmoving party must come forth with specific facts showing that there is a genuine issue of material fact upon which the moving party will bear the burden of proof at trial.

If after adequate discovery, the party bearing the burden of proof fails to make a showing sufficient to establish his claim, summary judgment is appropriate. Celotex, 477 US at 322-24, 106 S.Ct at 2552-53. "The bottom line of the summary

judgment trilogy of cases [citations omitted] is that the court, when ruling upon a motion for summary judgment, after the parties have had an adequate amount of time to develop their proofs, must consider the motion as it would on a motion for judgment as a matter of law after the Plaintiff has presented his proofs and rested his case." Wynn v Morgan, 861 F. Supp 622 (ED Tenn. 1994) Some discovery must be afforded non-movant before summary judgment is granted. Whites Landing Fisheries v Buckhholzer, 29 F 3d 229 (6th Cir. 1994) **In this case, no discovery was permitted.**

Respondents were clearly on notice of the essence of Petitioners' complaint as it pertained to the conspiracy. F.R.Civ. P. 8 requires a "short and plain statement of jurisdiction", a "short and plain statement of claim showing that pleader is entitled to relief" and a "demand for judgment." In Leatherman v Tarrant County Narcotics Unit, 507 US 163; 122 L. Ed. 2d 515; 113 S. Ct. 1160 (1993), this Court held that a federal court may not apply a "heightened pleading standard", more stringent than usual pleading requirements of Rule 8 in 42 USC 1983 cases. Appellants plead clearly a conspiracy.

Conspiracies are not published in the paper. By definition, they are secret and kept from view. The documents and evidence supporting the conspiracy are hidden, thus the need for discovery.

As long as an issue is plead, a party does not have to state the exact theory of relief in order to obtain a remedy. Bechtler v Robinson, 886 F. 2d 644 (3rd Cir, 1989) A complaint is required merely to provide the opposing party with notice as to what is at issue in the law suit. Bargen v Dept. Of Defense, 623 F. Supp 290 (DC Nev, 1995) A complaint is sufficient if it sets forth enough information to outline the elements of a claim

or to permit inferences to be drawn that the elements exist. CPC Intern Inc. v Aerojet-General Corp., 731 F Supp 783 (WD Mich 1989) A complaint does need to set down in detail all particularities of plaintiff's claims against defendants. City of Heath, Ohio v Ashland Oil, Inc., 834 F. Supp 971 (SD Ohio, 1993).

> In its Opinion, the district court correctly states: In order to establish a §1983 claim, plaintiff Hamilton must show (1) that defendants acted under color of state law, and (2) that their conduct deprived him of a federal statutory or constitutional right. Parratt v Taylor, 451 US 527, 535 (1981), overruled on other grounds, Daniels v Williams, 474 US 327 (1986); Ellison v Garbarino, 48 F 3d 192, 194 (6th Cir. 1995)

The district court acknowledged that Appellees did not dispute that they were acting "under color of state law." The district court correctly concluded that Hamilton had a "property right, under Michigan law, Bundo v City of Walled Lake, 395 Mich 679; 238 NW2d 154 (1976) and then asked the question how much due process was required. From that point on, in the district court's analysis of Hamilton's Complaint, the district court never addressed the conspiracy issue.

In the Amended Verified Complaint (App 30a), Hamilton specifically stated that Respondent Roberts retained and utilized the services of an unlicensed private investigator, Respondent Farvway, Inc. Hamilton not only alleged that Roberts solicit an unlicensed private detective, it also solicited the help of Respondents Ronald and Lydia Sweatt, private citizens, in this endeavor. The district court totally ignored these allegations.

While Michigan does not have a common law civil conspiracy, Hamilton's complaint allege both tortious and criminal conduct. Hamilton's Complaint alleges the tort of invasion of privacy, Lewis v Dayton Hudson Corp. 128 Mich App 165; 339 NW2d 857 (1993), tortious interference with business interrelations, Jackovich v General Adjustment Bureau, Inc., 119 Mich App 221; 326 NW2d 458 (1982); Kollenberg v Ramerez, 127 Mich App 345; 339 NW2d 176 (1983), and intentional infliction of emotional distress. Frishett v State Farm Mut. Auto Ins. Co., 3 Mich App 688; 143 NW2d. These are but a few of the torts set forth in Hamilton's complaint that were committed by Respondents in furtherance of their conspiracy.

The use of an unlicensed private detective together with the use of false liquor control violations establish the basis for a conspiracy under 42 USC 1983. Hamilton does not claim damage to his reputation alone. Coupled with an attempt to deprive him of his property right, damage to his reputation is actionable. Creation of false liquor control violations, creation of false civil complaints, instructing police officers to fabricate allegations, unlawful use of an unlicensed private investigator, cannot be said to be due process.

Conspiracy claims are actionable under 42 USC 1983. Liffiton v Keuker, 850 F. 2d 73 (2nd Cir. 1998), Comfort v Town of Pittsfield, 924 F. Supp 1219. It is not necessary to establish an expressed agreement between all of the conspirators to find the existence of a "civil conspiracy", i.e. an agreement between two or more persons to injure another by unlawful action. All that must be shown is that there was a single plan and that the co-conspirators shared in the general conspiratorial objective coupled with an overt act in furtherance of the conspiracy to injure complainant. Hooks v Hooks, 771 F. 2d

935 (6th Cir. 1995). In Vincent v Campbell County Fiscal Court, 820 F. 2d 194 (6th Cir. 1987), it was acknowledged that egregious governmental action, such as the conspiracy alleged here, constituted a violation of substantive due process.

Substantive due process rights involve fundamental rights. In Carey v Pipphus, 435 US 247; 55 L. Ed 252; 98 S. Ct. 1042 (1978), this Court said that the fact that a significant property interest is at stake is enough to invoke the procedural safeguards of the Fourteenth Amendment. In Memphis Light, Gas & Water Div. v Craft, 436 US 1; 56 L. Ed. 2d 30; 98 S. Ct. 1554 (1978) this Court defined a substantive property interest as that interest which is created by an independent source such as state law. Accordingly, this Court stated that it was entitled to protection under the due process clause.

The District Court acknowledged Hamilton's property interest but then concluded that an overriding state interest prohibited Hamilton from establishing that a conspiracy existed. The interests of the state are never to have public officials abuse their governmental positions and conspire to deprive a citizen of a property right.

The 6th Circuit Court of Appeals found the District Court's reasoning incorrect. However, the Circuit Court concluded that because Hamilton failed to produce concrete evidence of the conspiracy, summary judgment was proper. The 6th Circuit Court concluded that Hamilton, under F.R. Civ. P 56(f) (App 64a) should have filed an affidavit with the trial court asking for a continuance, asking for discovery and setting forth facts that would have established the conspiracy.

Hamilton filed a verified complaint on behalf of himself and his corporations. Respondents filed a Motion to Stay Discovery with the District Court and Hamilton protested the

lack of discovery. Rule 26(f) (App 64a) requires the parties to file a plan with the court regarding discovery and calls upon the parties to agree to the discovery plan. In this case, such discovery plan was impossible.

The District Court knew that there was no discovery. The Court knew that the initial Motion to Dismiss and the subsequent Motion for Summary Judgment occurred within 30 days of the filing of the complaint. Obviously there was no time for discovery. The affidavits filed by the MLCC Defendants were mere denials. There were no factual allegations in the affidavits.

The MLCC Respondents did not supply the affidavits until after they had filed their Motion for Summary Judgment. F.R.Civ. P. Rule 56 requires the affidavits to be filed with the Motion, not after the Motion. Canning v Star Publishing Co., 19 FRD 281 (DC Del, 1956)

The District Court opinion and the 6th Circuit Court opinion in this case overrules the intent, if not the letter, of this Court's opinion in Adickes v Kress & Co., 398 US 144, 26 L Ed 2d 142, 90 S. Ct. 1598 (1970). Adickes involved a claim of conspiracy by governmental officials and a granting of summary judgment. This Court concluded that the grant of summary judgment was improper because respondent failed to show the absence of any genuine issue of material fact.

Adickes involved the only published opinion where this Court has discussed the application of Rule 56(f). This Court in Adickes quoting Moor, Federal Practice §56.22[2] stated:

> It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit. And the peril rightly continues [after the amendment to Rule 56(e)]. Yet the party

> moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required.

This Court indicated that it would have been better had Adickes come forward with an affidavit showing evidence of the alleged conspiracy.

The Adickes court held that F.R.Civ. P. 56(e) was not "intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact." Rule 56(f) was also not intended to modify the burden of the moving party.

Respondents do not deny the conspiracy. They never filed an answer. The District Court knew that no discovery had occurred but nevertheless rendered its opinion. The Court of Appeals states that Hamilton's verified complaint is replete with conclusions and hearsay. In a complaint for conspiracy, hearsay may be all of the evidence that is initially available. Summary judgment was never intended to take the place of discovery or trial.

The elements of a conspiracy were plead as were specific overt acts, i.e. hiring an unlicensed private investigator. The complaint in this case placed everyone on notice, and if the same allegations were made in a criminal indictment, the indictment would have withstood a motion to quash.

Petitioner was not dilatory in taking discovery. He could not take discovery. The purpose of Rule 56(f) was to establish that sufficient discovery had not occurred and that he has been thwarted in his efforts to obtain discovery. This information was all well known to the trial court. To claim as did the 6th Circuit

that Petitioner was under an obligation to file a Rule 56 Motion, was tantamount to requiring Petitioner to commit an act of futility. To affirm summary judgment on the grounds that Petitioner failed to advise the District Court judge of that information of which she was fully aware is to deny these Petitioners fair consideration. 56(f) was never intended to be applied as applied in this case.

Trial by affidavit is not permitted. Benton-Volvo-Metairie Inc. v Volvo Southwest, Inc., 479 F 2d 135 (5th Cir 1973) The Circuit Courts have uniformly held the right of some discovery and the Circuit Court's decision is directly in conflict with this Court's decision in Anderson v Liberty Lobby, Inc., 477 US 242, 106 S. Ct 2505, 91 L Ed 2d 202 (1986).

The District Court incorrectly found that Petitioner's conspiracy complaint was prohibited by compelling state interests. The 6th Circuit Court of Appeals, while noting that the District Court was in error, did not remand but applied a court rule that has never been applied in this manner.

As stated, this is a case of first impression, no district court or circuit court of appeals has adopted the position taken by the 6th Circuit in this case. Clearly, the 6th Circuit's decision in this case conflicts with and overrides the intent, if not the letter of this Court's position in Adickes.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.

Dated: 2/4/99

Respectfully submitted,
Sempliner, Thomas & Boak

Stephen H. Boak (P10912)
Attorney for Petitioners

97-1696

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN L. HAMILTON, ET AL., Plaintiffs-Appellants,	)	**FILED** **NOV 06 '1998** **LEONARD GREEN, CLERK**
v.	)	
LARRY ROBERTS, ET AL., Defendants-Appellees.	)	**ORDER**

BEFORE: KEITH, BATCHELDER, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes, that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

FILED
SEP 10, 1998
LEONARD GREEN, Clerk

Case No. 97-1696

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN L. HAMILTON; HAMILTON BOGARTS, INCORPORATED, a Michigan corporation: JO-BET INCORPORATED, a Michigan corporation,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
Plaintiffs-Appellants,	)	
LARRY ROBERTS; PHILLIP ARTHURHULTZ; MAXINE L. PERRY; SEYMOUR E. PODOLSKY BETTY E. PULLIAM; JACQUELYN A. STEWART; THOMAS A. VANTIEM; JOHN DOE; EDWARD CARRAVALLAH; FARVWAY INCORPORATED; RONALD SWEATT; LYDIA SWEATT,	)	
Defendants-Appellees.	)	

BEFORE: KEITH, BATCHELDER, and COLE, Circuit Judges.

PER CURIAM. Plaintiffs-Appellants John Hamilton ("Hamilton"), Hamilton Bogarts, Inc., and Jo-Bet, Inc filed a verified complaint seeking to have Michigan Liquor Control Commission ("MLCC") Rule 436.1411, MICH. ADMIN CODE r. 436.1411(1) (1980 AACS), declared "unconstitutional, a violation of the First Amendment right of free speech, sexually

discriminating, void for vagueness and overbreadth and as applied to Bogarts and Jo-Bet in particular a denial of equal protection... and as applied to John Hamilton, Defendants ate interfering with his right of association, right of employment, and denying [him] equal protection."

Hamilton also alleged that the below-named defendants, under color of law and in retaliation for Hamilton's support of the current prosecutor's political opponent, agreed and conspired to deprive Hamilton of property, and in so doing, denied him equal protection of the laws and substantive and procedural due process, all in contravention of 42 U.S.C. § 1983. Hamilton named the following individuals as defendants: Wayne County Assistant Prosecutor Larry Roberts; Wayne County Deputy Sheriff Edward Carravalla; unknown Wayne County deputy sheriffs; MLCC Commissioners or employees Philip Arthurhultz, Maxine Perry, Seymour Podolsky, Betty Pulliam, and Jacquelyn Stewart (referred to collectively as "MLCC Defendant");1 and unknown MLCC Enforcement Agents associated with the Lincoln Park or Lansing, Michigan, office of the MLCC. Hamilton subsequently amended the complaint to, among other things, add as defendants Ronald and Lydia Sweated and Farvway, Inc.

Defendants Roberts and Carravallah moved to dismiss the Plaintiffs' claims against them and to stay discovery, until the court ruled on their immunity defend; the MCLL Defendants moved for summary judgment. On December 13, 1996, Plaintiffs filed a response to the motion to dismiss, and on December 31, 1996, Plaintiffs filed a brief in opposition to the summary judgment motion On January 30, 1997, the MLCC Defendants filed a supplemental motion to dismiss and for summary judgment, which was subsequently joined by all other defendants. Plaintiffs never responded to this renewed summary judgment motion, and nothing indicates that they requested additional time to do

---

1 Hamilton also as a defendant MLCC employee Thomas VanTiem, but on appeal asserts that he has dropped all allegations against Van Tiem

so. On May 29, 1997, the district court entered summary judgment in favor of all defendants and against Hamilton and the corporate defendants.

Plaintiffs now appeal the district court decision granting summary judgment and the court's ruling that the MLCC role was not void for vagueness. For the reasons that follow, we AFFIRM the judgment of the district court. 2

I.

Hamilton and his wife own four "adult entertainment" bars, all of which serve alcoholic beverages, located in Wayne County, Michigan. According to Plaintiffs' complaint, in 1991, during a hearing on an alleged violation by one of the bars, Hamilton overhead Assistant Attorney General Richard Rubin instruct a defense witness not to testify on behalf of Hamilton and the bar. Hamilton reported this incident to the Attorney General's office, and Rubin's supervisor, Assistant Attorney General Arthur D' Hondt, agreed that Rubin would no longer participate in any MLCC proceedings against Plaintiffs. Neither Rubin nor D' Hondt was named as a defendant in the instant action.

Between 1991 and 1994, 31 liquor violation tickets were issued against Hamilton's bar Jo-Bet Inc., d/b/a Henry VIII - South. The majority of these tickets alleged violations of MLCC Rule 436.1411. MLCC Rule 436. 1411 provides in pertinent part: "(1) An on premises licensee shall not allow in or upon the licensed premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus." Between 1992 and 1994, three liquor violation tickets were also issued against one of Hamilton's bars, Hamilton Bogarts Inc., d/b/a "Bogarts Joint;" two of the tickets were for violations of

---

2. Appellees Roberts and Carravallah also argue that they are entitled to absolute and/of qualified immunity. The district court did not base its decision on this ground, and these Appellees did not file a cross appeal. Thus, this issue is not before us.

MLCC Rule 436.141 l. Some of the charges against these two establishments were dismissed after administrative hearings, but a number of them resulted in monetary fines.

Because of Jo-Bet's repeated citations for MLCC violations, on June 10, 1994, after holding an evidentiary hearing, MLCC Administrative Law Judge Van Tiem revoked Jo-Bet's liquor license. On January 4, 1995, the MLCC appeals board affirmed the revocation decision. The case was then appealed to the Wayne County Circuit Court, where the parties settled the matter by stipulating that the case would be remanded to the MLCC to withdraw the revocation and permit lo-Bet to transfer its license to persons approved by the MLCC[3].

The settlement agreement later broke down when the City of Southgate denied approval of Hamilton's attempt to transfer his liquor license and entertainment permits to a single buyer. Hamilton sued the City of Southgate in Wayne County Circuit Court for denial of the transfer; that case is currently on appeal before the Michigan Court or Appeals. Hamilton has repeatedly asserted that he is not currently trying to relitigate the Jo-Bet license revocation; instead, he asserts, this revocation is of "evidentiary value," i.e., tending to show the existence of the "conspiracy" alleged in his complaint.

According to the allegations in Plaintiffs' complaint, sometime prior to the initial revocation hearing and after Hamilton's complaint regarding Rubin, Rubin and D'Hondt met with all of the MLCC Defendants except Arthurhultz (who did not join the MLCC until 1995), and each agreed and conspired to deprive Hamilton of his right to maintain employment with the various bars and adult entertainment facilities with liquor licenses, and his right to own a

---

3 Upon transfer of the license, Jo-Bet also was also to pay a $20,000 fine and until the transfer was effectuated, was to prohibit all dance performers and patrons "from engaging in physical touching of groin areas for men ,or pubic region for women, in and during table dance performances."

liquor license in the State of Michigan. More specifically, Plaintiff claimed that MLCC Defendants created a policy and utilized "Unknown Enforcement Agents" to do the following: create false liquor control violations against establishments owned or operated by Hamilton; threaten or coerce "independent contractors" (i.e., topless dancers) renting the use' of Hamilton's facilities to commit liquor control violations; harass Hamilton's family; communicate and publish false information regarding Hamilton and the bars; encourage business competitors to urge dancers not to utilize Hamilton's facilities and to make derogatory statements about Hamilton and his businesses; and harass customers frequenting the bars.

Hamilton also claimed that Defendant Unknown MLCC Enforcement Agents successfully enlisted the services of Defendant Carravallah and other Unknown Wayne County Deputy Sheriffs to participate in the conspiracy, and that Defendant Arthurhultz joined the conspiracy in 1995, when he became an MLCC employee. Hamilton further maintained that the MLCC Defendants and the Unknown MLCC Enforcement Agents compiled "raw intelligence files" on Hamilton and communicated this information to the public, thereby defaming his character.

In addition, Hamilton alleged that in 1995 or 1996, Defendant Roberts joined the conspiracy and that at all relevant times, Roberts acted in an administrative or investigatory capacity or as a political campaigner on behalf of the Wayne County Prosecutor. Roberts then allegedly enlisted the Sweatts, Hamilton's business competitors, to join the conspiracy. Acting at Robert's behest, the Sweatts then allegedly utilized the services of Farvway, Inc. to spy on Hamilton and his corporations, fabricated and communicated allegations of liquor control violations occurring at Hamilton's bars, and publically attacked Hamilton and his bars. Farvway employees, Hamilton says, readily), joined the conspiracy.

Finally, Hamilton alleged that in April 1996, Defendants Roberts, Carravallah, Unknown MLCC Enforcement Agents and Deputy Sheriffs held a meeting "wherein the deputies were informed

and instructed to 'shut the untouchable John Hamilton down' by any means." Hamilton also alleged that during some unidentified time, Defendant Roberts instructed subordinate prosecutors to enhance charges against dancers performing at Hamilton's corporations whenever possible.

Attached to the Defendants' motion for summary judgment were the affidavits of all MLCC Defendants and Arthur D'Hondt, stating that the alleged conspiratorial conversation never took place.

II.

A. Timing of the Summary Judgment Ruling

Hamilton claims first that the district court prematurely granted summary judgment because no discovery was conducted before the court entered judgment. Hamilton, however, failed to preserve this issue for appeal.

We review for an abuse of discretion a claim that summary judgment was prematurely entered. **Vance v. United States,** 90 F. 3d 1145, 1149 (6th Cir. 1996). It is true that the grant of summary judgement, may constitute an abuse of discretion where the nonmovant was not given sufficient ,opportunity to conduct discovery. **See White's Landing Fisheries, Inc. v. Buchholzer**,, 29 F.3d 229,:231-32 (6th Cir. 1994). We have previously made clear, however, that in cases where the appellant ,makes such a claim,

> the appellant must have complied with the strictures of Federal Rule of Civil Procedure 56(f), under which the district court may defer summary judgement,, pending discovery, if the non-movant submits affidavits stating that "the party cannot reasons stated present by affidavit facts essential to justify the party's opposition." In other words, if the appellant has not filed either a Rule 56(f) affidavit or a motion that gives the district court a chance to rule on the need for additional discovery, this court will not normally address whether there was adequate time for discovery.

Plott v. General Motors Corp., 71 F.3d 1190, 1196 (6th Cir. 1995) (citations omitted); *see also Klepper v. First Am. Bank*, 916 F.2d 337, 343 (6th Cir, 1990) (affirming grant of summary judgment despite insufficient discovery opportunity where appellant never filed Rule 56(f) affidavit). The Rule 56(f) affidavit must "detail" the discovery needed; the appellant bears the burden of demonstrating to the district court specific reasons why the appellant cannot oppose the summary judgment motion and how postponement of a ruling would enable him or her to rebut the moving party's showing of the absence of a genuine issue of fact. *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cit. 1989).

In the present case, Hamilton never filed a Rule 56(f) affidavit and never moved for discovery.4 The only statements ever made with respect to discovery were set out in Hamilton's answer to Defendants' original summary judgment motion, wherein he states *en toto:* "Perhaps, at the onset, the four (4) commissioners..., intended only to harass Hamilton, not drive him from the liquor industry. Only discovery will tell at what precise moment when the conversation between D'Hondt and the Commissioners turned into a conspiracy to deprive Plaintiff of his property.. '"Defendants state that 'Plaintiff's equal protection claim.., must be supported by statistical evidence..." Without an opportunity to depose Defendants, and relevant witnesses., the statistical evidence which is in Defendant's possession, [sic] is unavailable to Plaintiff; "In the instant case, no discovery has occurred. There have been no depositions, no interrogatories, not even an answer. At best, Defendant's Motion for Summary Judgment is premature."

Not only are these claims not in affidavit form as required by

---

4 In fact, despite the passing of several months between the Defendants renewed motion for summary judgment and the court's ruling, Plaintiff never even submitted a brief in opposition to the renewed motion. In making its ruling, the court apparently utilized the arguments contained in Plaintiffs' brief in opposition to Defendants' original motion.

Rule 56(f); these statements do not "detail" why Hamilton cannot present any affidavit testimony supporting his civil rights claims. He does not indicate who will be deposed; how he will possibly show the contents of the alleged conversation between D'Hondt and the commissioners, or that it even occurred, when all of the commissioners have averred that no such conversation took place: or what other discovery he would need to prove his case. Moreover, with respect to his equal protection claim, he does not explain his failure to include any affidavits whatsoever from other bar owners who were not ticketed for similar conduct. Likewise, he does not explain his failure to include affidavits from those patrons/family members allegedly harassed, or to provide copies of the allegedly defamatory publications. Thus, because Hamilton completely failed to comply with the strictures of Rule 56(f), either in form or in substance, we conclude that the district court did not abuse its discretion in granting summary judgment when it did.

B. Merits of the Claim

To establish a § 1983 claim, a plaintiff must show (1) that defendants acted under color of :state law, and (2)that their conduct deprived the Plaintiff of a federal statutory or constitutional right. Parratt v._Taylor, 451 US. 527, 535 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986) Defendants do not dispute that they were acting under color of state law.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving : party is entitled to judgment as a matter of law, FED R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of showing the district court that there is an absence of a genuine dispute over any material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1985) This burden may be carried either by producing evidence showing the absence of a genuine issue material fact or by " 'showing'--- that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case'" Id. at 325; FED. R. CIV. P. 56(b) (a party may

move for summary judgment with or without supporting affidavits). The party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue, for trial." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986) (alteration in original:) (quoting First Nat'l Bank v. Cities Serv. Co.391 U.S. 253 (1968)); .see also FED. R. CIV. P. 56(e).

The district court found that Hamilton did not state a substantive due process claim, and concluded that Hamilton was afforded sufficient procedural due process. Hamilton claims that instead of considering the "main thrust"s of his complaint, which he identities as a conspiracy and an egregious abuse of governmental power to deprive Hamilton of property under color of law, in violation of *Hamilton's* substantive and procedural due process rights, the district court instead "directed its attention to the conclusion that .. Hamilton[ ] was being afforded equal protection on the past liquor control violations and therefore not deprived of procedural due process." Hamilton further contends that the district court erroneously concluded that he would be afforded procedural due process because a number of the Defendants are the administrative law judges who preside over liquor license revocations, and Hamilton cannot be assured that a state court would stay enforcement of Appellee's revocation order.

Hamilton's § 1983 claims revolve around an alleged conspiracy to run him out of business, but he has completely failed to set forth any evidence demonstrating that a genuine issue of material fact with regard to the alleged conspiracy exists. Thus, assuming without deciding whether the actions alleged could state a claim of either a substantive or procedural due process violation, we hold that the district court properly granted summary judgment.

---

s 'An interesting choice of terms , given Plaintiff's occupation and the basis of this complaint.

Hamilton claims *repeatedly*, that we must accept as true the allegations made within the verified complaint and that these allegations create a genuine issue of material fact. What Hamilton fails to understand, however, is simple verification is not enough to save what are nothing more than conclusory allegations. While it is true that statements made in a verified complaint may function as the equivalent of affidavit statements for purposes of summary judgement, see, e.g., *Williams v. Browman*, 981 F.2d 901, 905 (6th Cir. 1992); *Khan v. Garanzini*, 411 F.2d 210, 212-13 (6th Cir. 1969), affidavit statements must be on the basis of personal knowledge. FED. R. CIV.. P. 56(e) (affidavits opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein"). Hearsay evidence cannot be considered on a motion for summary judgment. *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994). And conclusory allegations made within a verified complaint are insufficient to withstand a motion for summary judgment. See *Wilson v. Turner*, No. 95-3192, 1995 WL 570922, at *1 (6th Cir. Sept.27, 1995)(unpublished)(citing Moore v. Philip Morris Cos., 8 F.3d 335, 343 (6th Cir. 1993) and *Emmons v. McLaughlin*, 874 F. 2d 351, 355 (6th Cir. 1989)); *see also Hooks v. Hooks*, 771 F.2d 935, 945-46 (6th Cir. 1985) (verified complaint, to extent that allegations therein were based upon personal knowledge, satisfied requirements of a Rule 56(e) opposing affidavit).

Hamilton's complaint, although verified, contains almost exclusively hearsay evidence and conclusory allegations. To only relevant statements within Hamilton's personal knowledge are: (1) Jo-Bet had received numerous liquor control violations, resulting in a license-revocation proceeding; (2) that former MLCC Commissioner Alex Laggis instructed and advised Hamilton that "lap dancing" was permissible conduct; (3) that MLCC enforcement agents, unknown lawenforcement officers and deputies

and the administrative staff of the MLCC allegedly withheld from Hamilton the names of the dancers that violated the purported MLCC regulations and did not notify the corporations or Hamilton about the violations for a "substantial" period of time; and (4) that sometime during the end of May/beginning of June 1996, an Unknown Defendant Deputy Sheriff informed Hamilton that Defendants Roberts, the Unknown MLCC Enforcement Agents, and his superiors at the Wayne County Sheriff's Department had advised the deputy sheriffs to write liquor control violations for Hamilton's bars "whether or not in fact there was a violation." This second and fourth statements, of, course, are hearsay and cannot be admitted for their truth. *See FED. R. EVID.* 801 (C), 802. The remaining averments simply do not support the existence of the alleged conspiracy.

Because Hamilton has completely failed to present any evidence tending to show the existence of a conspiracy among any of the defendants, and because his § 1983 claim raises solely activities undertaken as part of and in furtherance of the alleged conspiracy, summary judgment on that claim was proper. Further, Hamilton's failure to provide any evidence of a conspiracy among MLCC members renders meritless his claim that the district court improperly concluded that the right to appeal to the MLCC appeals board afforded him adequate process. Moreover, the fact that prior to license revocation, an aggrieved party may appeal an MLCC decision to the state courts protects against the possibility of bias. Thus, we conclude, the district court properly granted summary judgment.

III.

Plaintiffs ,also argue that MLCC Rule 436.1411 is unconstitutionally vague because the phrase "simulates performance of sexual intercourse" is open to multiple interpretations and gives enforcement officers unfettered discretion in determining what constitutes a violation of the rule.[6] We review de *novo* the question of whether a statute is for vagueness. *United*

States v. Biro, 143 F. 3d 1421, 1426 (11th Cir. 1998).

As an initial matter, we note our disagreement with the district court's analysis of this issue. Analogizing to *Ron's Last Chance, Inc. v. Liquor Control Comm'n*, 333 N.W.2d 502 (Mich Ct. App. 1983), the district court held that "The regulation at issue here, which prohibits the simulated performance of sexual intercourse, is consistent with Michigan's criminal laws prohibiting prostitution and is not unconstitutionally vague." In *Ron's Last Chance*, the Michigan appellate court found that a regulation barring licensees from allowing in or upon the licensed premises "any accosting and/or soliciting for immoral purposes" passed the vagueness test as applied to the facts before it because prostitution and solicitation were illegal under Michigan law. *Id.* at 504. As Plaintiffs correctly point out, however, defining the boundaries of"simulated performance of sexual intercourse" has nothing to do with a prohibition against prostitution, and the analogy is misconceived.

Nonetheless, we uphold the ruling of the district court because there can be no doubt as to what conduct the rule prohibits. As set out above, MLCC Rule 436.1411 provides in pertinent part: "(1) An on premises licensee shall not allow in or upon the licenced premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus." Plaintiffs do not claim that the definitions of "sexual intercourse" or "performance of are unclear, instead, they insist that the average person cannot possibly discern the meaning of the

---

6 Plaintiffs style their argument on appeal as a vagueness challenge and therefore we respond accordingly. Looking at the arguments and the record as a whole, however, we believe that plaintiffs' actual contention is a claim of selective prosecution, i.e., that they are being held responsible for conduct that other similarly-situated entities are permitted to perform. To the extent that this is their true complaint, however, Plaintiffs have completely failed to provide any evidence of such disparate treatment.

word "simulate." We resoundingly disagree. This is an understandable common term within the vocabulary of the average person, and a simple perusal through any dictionary would clear up any conceivable confusion. *See Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 441 (6th Cir. 1998). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) (1986) defines "simulate" as "to give the appearance or effect of: FEIGN, IMITATE." Similarly, BLACK'S LAW DICTIONARY defines "simulate" as "To assume the mere appearance of, without the reality;... feign; imitate; pretend." Thus, in even simpler terms, the rule prohibits licensees from having on their premises persons who pretend to actually perform sexual intercourse. If the rule were any more explicit, it would run the risk of itself being obscene![7]

Moreover, Plaintiffs, although raising numerous red herrings with regard to the conduct of their dancers, have not claimed that the conduct performed by their dancers does not simulate the performance of sexual intercourse. In *Young v. American Mini Theatres*, 427 U.S. 50 (1976), the Supreme Court held that it was unnecessary to consider vagueness when an ordinance indisputably applies to the plaintiff, *i.e.*, when there is no vagueness as to him. Id: at 58-59 (refusing to consider in the

---

7 Plaintiffs' reliance on *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), is misplaced. *Giaccio* involved a statute requiring in all cases of acquittals that the jury "determine... whether the county, or the prosecutor, or the defendant shall pay the [court] costs.". Acquitted defendants against whom costs were assessed were committed to jail until the costs were paid. The Court held that the statute was void for vagueness because it authorized juries to assess costs against acquitted defendants without prescribing any definite standards to govern their determination. Id. p. 400-403, 405. While it true that police and judges cannot be permitted to define subjectively what will constitute prohibited conduct , MLCC 436.1411 does not permit them to do so. The rule explicitly prohibits " simulated" "performance" of" sexual intercourse." The common meanings of these terms provide a reasonable legislative limitation on the prohibited conduct.

abstract the words "characterized by an emphasis on matter depicting" specified sexual activities); *see also City of Renton v. Playtime Theatres*, 475 U.S. 41, 55 n.4 (1986); *Richland Bookmart*, 137 F.3d at 44]. Therefore, we conclude that Plaintiffs constitutional challenge is without merit.

CONCLUSION

Accordingly, we AFFIRM the district court's grant of summary judgment and ruling that MLCC 436.1411 is not void for vagueness.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN HAMILTON,
HAMILTON BOGARTS, INC.,
and JO-BET, INC.,

Plaintiffs,

vs

Case No. 96-CV-60376-AA
HON. BARBARA K. HACKETT

LARRY ROBERTS, PHILLIP ARTHURHULTZ, MAXINE L. PERRY, SEYMOUR S. PODOLSKY, BETTY E. PULLIAM, JACQUELYN A. STEWART, THOMAS A. VANTIEM, UNKNOWN MICHIGAN LIQUOR CONTROL ENFORCEMENT AGENTS, EDWARD CARRAVALLAH, UNKNOWN WAYNE COUNTY DEPUTY SHERIFFS, RONALD SWEATT, LYDIA SWEATT AND UNKNOWN OFFICERS AND EMPLOYEES OF FARVWAY, INCORPORATED,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs are John Hamilton and two adult entertainment bars which he owns, Hamilton Bogarts, Inc. and Jo-Bet, Inc., which feature topless dancers. Plaintiffs allege civil rights claims arising out of liquor control violation tickets issued against the bars for lap dancing and other prohibited conduct pursuant to the Michigan Liquor Control Act (MLCA). Plaintiffs allege that the tickets were

part of a conspiracy by the Wayne County prosecutor's office and others to shut down Hamilton's businesses in retaliation for his support of the political opponent of the current prosecutor in a recent election. Plaintiffs also claim a private conspiracy by plaintiff alleged competitors existed. Defendants are Wayne County assistant prosecutor Larry Roberts, Wayne County deputy sheriff Edward Carravalla and unknown Wayne County deputy sheriffs, employees of the Michigan Liquor Control Commission (MLCC): Philip Arthurhultz, Maxine Perry, Seymour Podolsky, Betty Pulliam, Jacquelyn Stewart, and Thomas VanTiem (the MLCC defendants), and unknown MLCC agents, unknown officers and employees of private investigation firm Farvway Inc., and Ronald Sweatt and Lydia Sweat, two individuals who operate a competing adult entertainment bar.

Now before the court are two motions: (1) the MLCC defendants' (Arthurhultz, Perry, Podolsky, Pulliam, Stewart and VanTiem) motion for summary judgment, and (2) Wayne County defendants Roberts' and Carravallah's motion to dismiss and/or to stay discovery. Defendants Ronald Sweatt and Lydia Sweatt and Farvway, Inc. also have filed concurring motions seeking dismissal and/or summary judgment for the reasons previously stated in the prior motions. The Wayne County defendants also filed a concurring motion joining in the MLCC defendants' motion for summary judgment. Because the court has considered matters outside the pleadings in resolving these motions, the court shall treat the motions as ones for summary judgment pursuant to Fed. R.Civ. P. 56. For the reasons stated below, defendants' motion for summary judgment shall be granted.

BACKGROUND

Plaintiffs filed their amended complaint on January 22, 1997, after the Wayne County defendants and MLCC defendants had filed their motions to dismiss and for summary judgment. The defendants in this case have filed supplemental briefs addressing the issues raised in the amended complaint. Accordingly, the court shall

address the pending motions in regard to the amended complaint. In doing so, the court notes there is some confusion as to whether Thomas VanTiem remains a named defendant. Although MLCC defendant Thomas VanTiem was named in the caption of both the original and the amended complaint, in its response brief, plaintiffs maintain that VanTiem was incorrectly added as a party defendant and that he was deleted as a party defendant in the amended complaint. The amended complaint, however, does not reflect plaintiffs' claim that they dropped VanTiem as a defendant. For this reason, the court will address the motions with the understanding that VanTiem is a defendant.

The amended complaint was filed on January 22, 1997. It alleges that liquor control violation tickets were issued against Hamilton's bars as part of a conspiracy which started around 1991 and will continue until defendants have destroyed plaintiff Hamilton's businesses and forfeited all of his existing liquor licenses. Hamilton currently owns four liquor licenses including Hamilton Bogarts, Inc., Jo-Bet Inc., and Henry VIII Lounge.

Plaintiff Hamilton alleges the conspiracy started after an incident during a 1991 administrative hearing over an alleged liquor control violation by one of his bars, During that hearing, Hamilton alleges that Assistant Attorney General Richard Rubin allegedly instructed a defense witness not to testify on behalf of Hamilton's bar. Richard Rubin is not named as a defendant in this lawsuit but apparently was sued by plaintiff in a prior federal civil rights action. According to the complaint, after Hamilton contacted the MLCC and the Attorney General's office about Rubin's conduct, Assistant Attorney General Arthur D'Hondt stated that Rubin would not participate in any administrative hearings reharding any bar owned by Hamilton. Arthur D'Hondt also is not a named defendant in this case. Plaintiff tries to connect Rubin's conduct to the defendants in this case by alleging that after the 1991 incident D'Hondt met with all of the MLCC defendants except Arthurhultz, who did not join the MLCC until 1995, and conspired to put Hamilton's bars out of

business. He claims that as part of the alleged conspiracy the MLCC defendants (1) created false liquor control violations against bars owned by Hamilton and threatened or coerced topless dancers at his bars to commit violations; (2) harassed his family; (3) published false information about his investments; (4) encouraged business competitors to make negative public statements about Hamilton's businesses; and, (5) harassed customers that frequent his bars. Plaintiff Hamilton also claims that the MLCC defendants contacted unknown MLCC enforcement agents and instructed them to entrap the topless dancers to violate the MLCA Rules. He further claims that the Wayne County defendants, Robert Sweatt, Lydia Sweatt and Farvway later joined the conspiracy to shut down Hamilton's bars and to forfeit his liquor licenses.

Plaintiff Hamilton has pled very few facts in support of his conclusory allegations that defendants conspired to put him out of business. Specifically, Hamilton alleges that in April, 1996, Wayne County defendants Roberts, Carravallah and unknown MLCC agents and unknown Wayne County deputy sheriffs held a meeting where they decided to shut down Hamilton by any means. He further claims in May or June, 1996, he learned that unknown deputy sheriffs had been instructed to write liquor control violations against Hamilton whether or not there was a violation. The amended complaint alleges that defendants have acted to destroy his businesses and to forfeit his liquor licenses, but plaintiff has not alleged that any of his bars have been shut down or that any of his liquor licenses have been revoked.

From the briefings regarding the defendants' motions for summary judgment, however, the court has learned that the liquor license for plaintiff Jo-Bet, Inc. was forfeited based upon liquor control violations. Charges were brought against plaintiff Jo-Bet, Inc., d/b/a Henry the VIII South, for allowing in or upon the licensed premises the topless dancers in violation of Rule 436.1411 which provides, "An on premises licensee shall not allow in or upon the licensed premises a person who performs, or simulates

performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus." A hearing on the charges was held by an administrative law judge on December 13, 1994. The administrative law judge ordered that the liquor license be revoked. As a result of than license revocation, Hamilton filed an administrative appeal and an appeal in Wayne County Circuit Court. The administrative appeal was denied. The parties settled the appeal to Wayne County Circuit Court on August 4, 1995, and agreed to amend the revocation of the liquor license of Jo-Bet to allow Jo-Bet to transfer the license to another person within 90 days and to pay $20,000 to the State of Michigan as liquidated damages and costs. Pursuant to the parties' settlement agreement, the MLCC appeal board issued a modified order rescinding the revocation and allowing the liquor license to be transferred within 90 days of the order.

Apparently, the parties' settlement agreement later broke down when plaintiff tried to transfer its liquor license and entertainment permits for Jo-Bet together to a single buyer for a purported $1.7 million. The City of Southgate denied approval for transfer of the entertainment permit. Plaintiff Jo-bet then sued the City of Southgate for the denial of the transfer of the entertainment permit in Wayne County Circuit Court and that came is now on appeal to the Michigan Court of Appeals. Apparently, Jo-Bet still has not transferred its liquor license, as it desires to sell the liquor license and entertainment permits together but has been unable to do so. The MLCC has moved to vacate the stipulated order of dismissal which was entered pursuant to the settlement agreement on the grounds that the settlement agreement could not be implemented. Plaintiff claims that he is not trying to retaliate the Jo-Bet license revocation in this court and that the facts and circumstances of that case are merely of "evidentiary value" in this case. Plaintiff's position is perplexing. It is unclear how that case would be of any "evidentiary value" here. Plaintiff has not explained the significance of the Jo-Bet liquor revocation case in its briefs or in its amended

complaint.

The amended complaint alleges three counts. Count I alleges violations of 42 U.S.C. § 1983 on behalf of plaintiff John Hamilton only. Hamilton's §1983 claim alleges that. defendants conspired to destroy his adult entertainment businesses and his reputation, and attempted to forfeit his liquor license by ticketing topless dancers at his bars based on trumped up violations of MLCC regulations. Plaintiff Hamilton further alleges that the MLCC defendants denied his two sons' application for a liquor license based solely on their relationship to him. He further claims that Ronald Sweatt and Lydia Sweatt, who own a competing adult entertainment business, hired a private investigation firm to investigate his businesses, fabricated allegations of control violations against him, and publicly attacked Hamilton in oral and written public communications.

Count II of the complaint alleges a 42 U.S.C. § 1985 claim on the grounds that defendants conspired to violate his Fourteenth Amendment rights. Plaintiffs claim that they were treated differently than other bar owners with similar or worse violations of the MLCC Rules. Plaintiffs further silage that unknown officers of Farvway investigative firm and Ronald Sweatt and Lydia Sweatt acted as the agents of the Wayne County defendants in seeking to destroy Hamilton's businesses.

Count III of the Complaint seeks a declaratory judgement that MLCC Rule 436.1411 violates the First Amendment's protection of freedom of speech and freedom of association on its face and further contends that it is invalid as applied to Bogarts and Jo-Bet on the grounds that it is void for vagueness and violates the overbreadth doctrine. Plaintiffs claim that topless/exotic dancing is a form of protected speech. MLCC Rule 436.1411 provides, "An on premises licensee shall not allow in or upon the licensed premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus. In addition to declaratory relief, plaintiffs also seek

injunctive relief in the form of an order enjoining the enforcement of Rule 436.1411 against them.

STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled ~o judgment as a matter of law." See F.D.I C v Alexander, 78 F.3d 1103 1306 (6th Cir. 1996). The Supreme Court has affirmed the court's use of summary judgment as an integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. Celotex Corp. v Catrett, 477 US 317, 327 (1986); see also Kutrom Corp v. City of Center Line, 979 F.2d 1171, 1174 (6th Cir. 1992) .

The standard for determining whether summary judgment is appropriate is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Winningham v. North Am. Resources Corp., 42 F.3d 981, 984 (6th Cir. 1994) (citing Booker v. Brown & Williamson Tobacco Co), 879 F 2d 1304, 1310 (6th Cir. 1989)). The evidence and all inferences therefrom must be construed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co.Ltd.,.v. Zenith Radio Corp 475 U.S. 574, 587 (1986); Enertech Elec., Inc. v. Mahoning County Comm'r, 85 F.3d 257, 259 (6th Cir. 1996); Wilson v. Stroh Co., Inc., 952 F.2d 942, 945 (6th Cir. 1992). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-48 (1986); see also Hartleip v McNeilab, Inc. 83 F.3d 767, 774 (6th Cir. 1996)

If the movant establishes by use of the material specified in Rule

56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 270 (1968); see also Adams v Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1995). Mere allegations or denials in the non-movant's pleadings will not meet this burden. Anderson, 477 U.S. at 248. Further, the nonmoving party cannot rest on its pleadings to avoid summary judgment. It must support its claim with some probative evidence. Kraft v United States, 991 F.2d 292, 296 (6th Cir.), cert denied, 510 U,S. 976 (1993).

ANALYSIS

1. Count I

Count I of plaintiffs' amended complaint alleges a claim under 42 U.S.C. § 1983. According to the complaint, Count I is brought by plaintiff John Hamilton only, and not by his two adult entertainment bars which are also named as plaintiffs. In order to establish a §1983 claim, plaintiff Hamilton must show (1) that defendants acted under color of stale law, and (2) that their conduct deprived him of a federal statutory or constitutional right_ Parratt v. Taylor, 451 U.S. 527, 535 (1981), overuled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986) Ellison v Garbarino, 48 F.3d 192, 194 (6th Cir. 1995).

The Wayne County defendants and MLCC defendants do not dispute that they were acting under color of state law. Thus, the court turns to the question of whether defendants deprived plaintiff of a federal statutory or constitutional right. Hamilton claims that defendants deprived him of substantive and procedural due process.

In this case, plaintiff Hamilton has not established that he has been deprived of substantive or procedural due process. He claims that defendants conspired to deprive him of his occupation as a bar owner and of his reputation by issuing liquor control violations against several adult entertainment bars he owns. This claim does

not give rise to a substantive due process claim. The Supreme Court has explained that substantive due process has generally been limited to "matters relating to marriage, family, procreation, and the right to bodily integrity." Albright v Oliver, 510 U.S. 266, 271 (1994). The Supreme Court has held that there is no substantive due process right arising from one's reputation. Paul v. Davis, 424 U.S. 693, 709 (1976} . Similarly, there is no constitutionally protected liberty interest in the ownership of adult entertainment bars. See Wal-Juice Bar Inc. v Elliott, 899 F.2d 1502, 1506 (6th Cir. 1990).

Plaintiff also has failed to establish a deprivation of his procedural due process rights. In analyzing a claim for procedural due process, the court considers two factors: (1) whether plaintiff has been deprived of a protected interest in life, liberty, or property, and (2) how much process is due. Plaintiff argues that he has a protected property interest in his liquor license. Plaintiff is correct that courts have found that the issuance of a liquor license can give rise to a constitutionally protected property interest where it constitutes a "property" right under the analysis set forth by the Supreme Court in Board of Regents v Roth, 408 U.S., 564 (1972) See e.q., Brookpark Enter. Inc. v Taft 951 F.2d 710 (6th Cir. 1991), cert. denied, 506 U.S. 820 (1992); Reed v Village of Shorewood, 704 F.2d 943 (7th Cir. 1983); Bundo v Walled Lake, 395 Mich 679, 695 (1976) . In this case, defendants have not disputed that plaintiff has a property interest in his liquor licenses.

Once it is determined that the plaintiff has a property interest at stake, the next inquiry is "how much process is due." The Supreme Court set forth a three-part test for determining how much process is due in Matthew v. Eldridge, 424 U.S. 319 (1976). The three factors are: (1) the importance of the private interest at stake; (2) the strength of the governmental interest at stake; and, (3) the risk that the procedures used will lead to erroneous decisions. Id at 335. In this case, it is plaintiff's interest in a liquor license that must be weighed against the State's interest in regulating liquor sales

pursuant to the Twenty-First Amendment.

There are significant procedural safeguards in effect which protect plaintiff Hamilton from having his liquor license forfeited without due process. The MLCA provides for notice and a hearing bef~re a liquor license may be revoked or suspended and provides a licensee the right go appeal from a final determination of the MLCC. MCL § 436.20. Furthermore, plaintiff can appeal a decision of the MLCC in state court pursuant to the Administrative Procedures Act, MCL § 24.201 et seq. See Kassab v Acho, 125 Mich .App. 442, 336 N.W.2d 816 (1983) (appealing order of MLCC granting special designated distributor's liquor license).

Defendants contend that for each liquor control violation ticket issued against plaintiff's establishments, he was afforded due process through an evidentiary hearing, a right of appeal from the MLCC to the circuit court, and a right of appeal from the circuit court to the Court of Appeals. Plaintiff Hamilton has disputed this. In support of their argument, defendants have attached as exhibits proof that Hamilton was afforded an evidentiary hearing before an administrative law judge in the case of Jo-Bet's, Inc. The administrative law judge ordered that plaintiff Jo-Bet's liquor license be revoked. Defendants also submitted a copy of the decision of the appeal board of the MLCC, which affirmed the decision of the administrative law judge. Plaintiff Jo-Bet filed a petition for review of the MLCC's revocation of its liquor license in Wayne County Circuit Court and upon stipulation of the parties, the court entered an order staying enforcement of the revocation order. The parties eventually settled the appeal and modified the order revoking the liquor license to allow plaintiff to transfer the liquor license. Under these circumstances, where plaintiff has not only had an administrative hearing but an administrative appeal, as well as an appeal in state court, there is clearly no showing that plaintiff has been deprived of procedural due process.

Similarly, Hamilton's claims that defendants are conspiring to forfeit his other liquor licenses does not give rise to a

procedural due process claim where significant procedural safeguards are in effect. Hamilton's liquor licenses cannot be revoked without an administrative hearing before an administrative law judge. As in the case of Jo-Bet, Hamilton also has the right to an administrative appeal and to an appeal in state court. Accordingly, plaintiff Hamilton has failed to show a violation of his procedural due process rights and Count I shall be dismissed.

2. Count II

Count II alleges a violation of 42 U.S.C. § 1985(3) . The amended complaint alleges that defendants conspired to deprive plaintiff Hamilton of equal protection under the Fourteenth Amendment by (1) punishing Hamilton more harshly in administrative hearings than other bar owners with similar MLCC violations; (2) issuing false liquor control violation tickets against Hamilton's businesses in an effort to destroy his businesses; and (3) harassing Hamilton's customers, employees and dancers. The MLCC defendants filed a motion for summary judgment as to Count II which the Wayne County defendants, defendants Ronald Sweatt and Lydia Sweatt, and defendant Farvway have joined.

In order to establish a violation of § 1985(3), plaintiff Hamilton must show racial or otherwise class-based invidious discrimination. Griffen v. Breckenridge 403 US 88, 102 (1971); United .Brot.h. of Carpenters & Joiners of America, Local 610 AFL-CIO v. Scott, 463 U.S. 825, 834 (1983); Browder v. Tipton, 630 F.2d 1149 (6th Cir. 1980). In this case, plaintiff claims he has been treated differently than other bar owners. The Sixth Circuit has held that a "class protected by section 1985(3) must possess the characteristics of a discrete and insular minority, such as race, national origin, or gender." .Haverstick Enter. v. Financial Fed. Credit, 32 F.3d 989, 994 (6th Cir. 1994). Section 1985(3) protect ion does not extend to victims of nonracial political conspiracies. Grimes v. Smith, 776 F.2d 1359 (7th Cir. 1985). Plaintiff has not shown that he is a member of a protected class. Accordingly, his §1985 (3) claim must be dismissed.

3. Count. III

In Count III of their complaint, plaintiffs seek declaratory

and injunctive relief on the theory that MLCC Rule 436.1411 violates their freedom of speech under the First Amendment as applied through the Fourteenth Amendment. Plaintiff's argue Rule 436.1411 is constitutionally void on its face for vagueness and as applied against them on the theory that it violates the overbreadth doctrine. MLCC Rule 436.1411 provides, "An on premises licensee shall not allow in or upon the licensed premises a person who performs, or emulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus.. Plaintiffs argue that the phrase "simulates performance cf sexual intercourse, is unconstitutionally vague as MLCC officers have unfettered discretion in determining what constitutes a violation of that section.

Defendants argue that Rule 436.1411 is constitutional because case law establishes that state laws prohibiting topless dancing do not violate the First .Amendment. See Barnes v Glen Theatre Inc. 501 U S 560 (1991); City of Newport v Iacobucci 479 U S 92, 96 (1986); G&V Lounge v. MLCC, 23 F.3d 1071, 1073 (6th Cir. 1994). Defendants contend that if laws prohibiting nude dancing pass constitutional muster, then Rule 436.1411, which prohibits the simulated performance of sex acts, must by analogy survive plaintiffs' constitutional challenge.

Defendants are correct that the liquor license regulation in question comports with constitutional standards as set forth by the Supreme Court and the Sixth Circuit. See City of Newport, 472 U,S. at 95-96; New York State Liquor Auth. V Ballenca, 452 U.S. 714 (1981); Wal-Juice Bar, Inc. v Elliott, 899 F.2d 1502, 1506 (6th Cir. 1990). In each of the above cases, challenges were made to ordinances banning nude or topless dancing in an establishment licensed to serve liquor on the grounds that the ordinance violated the bar owner's First Amendment right to free expression secured through the Fourteenth Amendment. The Supreme Court has held that the Twenty-First Amendment waives the States broad regulatory powers over places selling liquor which includes the power to ban nude dancing. City of Newport, 472 U.S. at 95-96.

Moreover, in a similar case, Ron's Last Chance, Inc., v Liquor Control Comm. 124 Mich. App. 179, 333 N.W.2d 502 (!983), the

court was presented with a similar constitutional challenge to an MLCC regulation which barred licensees from allowing in or upon the licensed premises "any accosting and/or soliciting for immoral purposes." In that case, as in this one, plaintiff argued that the regulation was unconstitutionally vague and allowed the commission to make arbitrary and subjective enforcement of the rule. The Michigan Court of Appeals found that the regulation was not unconstitutionally vague because prostitution and solicitation for prostitution are illegal, MCL 750.448, and any person of ordinary intelligence would know that is what the regulation barred. Id at 183. MCL 750.448 makes it illegal to "commit prostitution or to do any other lewd or immoral act." The regulation at issue here, which prohibits the simulated performance of sexual intercourse, is consistent with Michigan's criminal laws prohibiting prostitution and is not unconstitutionally vague.

Moreover, Hamilton's claim that defendants misapplied the regulation and ticketed topless dancers at his bar in instances when they did no more than look at one another, is not supported by any facts. Hamilton has had hearings on past liquor control violations issued against his bars and is entitled to hearings on any alleged liquor control violations which he claims ray arise in the future. Hamilton has not shown that any of the past tickets were improper. Moreover, any claim that tickets will be issued against dancers at his bars without cause in the future is premature. Hamilton will have the opportunity to be heard if such an act does occur during the administrative proceedings and appeals, to which he is entitled, before his liquor license is suspended or revoked.

CONCLUSION

Because plaintiffs have not established the violation of any federal statutory or constitutional right, defendants' motions for summary judgment and to dismiss hereby are GRANTED and plaintiff's amended complaint hereby is DISMISSED WITH PREJUDICE.

SO ORDERED.

BARBARA K. HACKETT
United States District Judge

Dated: May 28 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN HAMILTON,
HAMILTON BOGARTS, INC., Case No. 96-CV-60376-AA
and JO-BET, INC., HON. BARBARA K. HACKETT

Plaintiffs,

vs

LARRY ROBERTS, PHILLIP ARTHURHULTZ, MAXINE L. PERRY, SEYMOUR E. PODOLSKY, BETTY E. PULLIAM, JACQUELYN A. STEWART, THOMAS A. VANTIEM, UNKNOWN MICHIGAN LIQUOR CONTROL ENFORCEMENT AGENTS, EDWARD CARAVALLAH. UNKNOWN WAYNE COUNTY DEPUTY SHERIFFS, RONALD SWEATT, LYDIA SWEATT AND UNKNOWN OFFICERS AND EMPLOYEES OF FARVWAY, INCORPORATED,

Defendants.

JUDGMENT

The above-entitled matter has come before the court on defendants' motion for summary judgment and in accordance with the court's order granting defendants' motion for summary judgment entered on May 28th, 1997,

IT IS ADJUDGED that judgment hereby is entered in favor of defendants.

Dated at Ann Arbor, Michigan, this 28th day of May, 1997.

BARBARA K. HACKETT
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN L. HAMILTON,
HAMILTON BOGARTS, INC.,
A Michigan Corporation, and
JO-BET, INC., a Michigan corporation.

Plaintiffs,

v

LARRY ROBERTS, PHILLIP ARTHURHULTZ, MAXINE L. PERRY, SEYMOUR E. PODOLSKY, BETTY E. PULLIAM, JACQUELYN A. STEWART, THOMAS A. VANTIEM, UNKNOWN MICHIGAN LIQUOR CONTROL ENFORCEMENT AGENTS, EDWARD CARRAVALLAH, UNKNOWN WAYNE COUNTY DEPUTY SHERIFFS, RONALD SWEAT, LYDIA SWEAT and UNKNOWN OFFICERS AND EMPLOYEES OF FARVWAY, INCORPORATED, a Michigan corporation.

Defendants.

File No:
Hon.

/

John E. Thomas (P21378)
Sempliner, Thomas & Boak
Attorneys for Plaintiff
711 West Ann Arbor Trail
Plymouth MI 48170-1677
(313) 455-4560

/

FIRST AMENDED VERIFIED COMPLAINT

NOW COME PLAINTIFFS, John Hamilton, Hamilton Bogarts, Inc., and Jo-Bet, Inc., by and through their attorneys, Sempliner, Thomas and Boak, pursuant to 42 USC §1983, 42 USC §1985 and 28 USC §2201 et seq. and, for their First Amended Verified Complaint shows unto this Honorable Court as follows:

1. That jurisdiction is based on 28 USC §1331 and §1343 and founded on the existence of a federal question arising under 42 USC §1983, 42 USC §1985 and 28 USC §1331 with the amount in controversy, exclusive of interest and costs, exceeding the sum of $50,000.00 and a federal question arising under the Fifth and Fourteenth Amendments of the United States Constitution and 28 USC §2201 seeking a declaratory judgment that Michigan Liquor Control Commission Regulation 436.1411 violates the First and Fourteenth Amendments of the United States Constitution and denies fundamental due process and equal protection, and is constitutionally vague and overly broad in application and interpretation.

2.That Plaintiff, John Hamilton is a resident of Wayne County, State of Michigan. Hamilton Bogarts, Inc. ("Bogarts") is a Michigan corporation duly incorporated in the State of Michigan with its principal offices in Wayne County, State of Michigan, and Jo-Bet, Inc., ("Jo-Bet") is a Michigan corporation duly incorporated in the State of Michigan with its principal offices in Wayne County, State of Michigan.

3.That Defendant, Larry Roberts, ("Roberts") is an assistant prosecuting attorney for the County of Wayne, State of Michigan.

4.That Defendants Maxine L. Perry, Seymour E. Podolsky, Betty E. Pulliam, Jacquelyn A. Stewart, and Thomas VanTiem ("Perry, et al") are each employees of the Michigan Liquor Control Commission ("MLCC"), acting in their personal, individual capacities under the color of law.

5.That Defendant Philip Arthurhultz ("Arthurhultz") is an employee of the MLCC.

6.That the unknown Michigan Liquor Control Enforcement Agents

("Agents") are employed at or associated with the Lincoln Park or Lansing, Michigan offices of the MLCC and assigned to enforce policy, customs and designs of the MLCC and its administrators.

7. That Edward Carravallah and the unknown Wayne County Deputy Sheriffs ("Deputies") are residents of Wayne County, State of Michigan, and are agents and employees of the Wayne County Sheriff, State of Michigan.

8. That Ronald Sweat and Lydia Sweat ["Sweats"] are residents of the State of Michigan, owners and/or operators of an adult entertainment bar, and formerly husband and wife.

9.That Farvway Incorporated ["Farvway"] is a Michigan corporation with its principal offices located in Oakland County. Farvway represents itself to be a corporation licensed to perform private investigative work pursuant to MCL 338.821 et seq. and MCL 338.1051 et seq; MSA 18.184(1) et seq and MSA 18.185(1) et seq. However, state police-records reflect no license for the corporation.

10.That assigned to the MLCC, by the Attorney General of the State of Michigan, are several assistant attorney generals who maintain offices in the space or complexes established for the MLCC. In other words, the assistant attorney general's function in the offices where tthe MLCC administrators and agents function and effectively take direction from or give direction to the MLCC.

COUNT I - 42 USC §1983

11.That plaintiffs incorporate by reference paragraphs 1-10 of this Complaint as if fully set forth herein.

12.That or the past 28 years, Plaintiff John Hamilton has owned personally, individually with his wife, or as an individual investor, numerous bars and adult entertainment facilities in and about the metropolitan Detroit area under various licenses and permits issued by the MLCC or operated or were employed by said bars and facilities, without significant problems or disputes with the MLCC until 1991.

13.That it is the function of the MLCC to regulate and administer

the sale and manufacture of intoxicating liquor in the State of Michigan and included in its function is periodic supervision of each business, corporation, partnership or individual that is involved in the sale or manufacture of intoxicating beverages. Periodic inspections by the MLCC, particularly of bars or restaurants, do, from time to time, result in a claim by a MLCC enforcement agent that a particular bar has violated an MLCC regulation.

14.That under the procedure established by the MLCC, if a violation is claimed by an enforcement agent of the MLCC, the licensee is entitled to an administrative hearing on the alleged violation.

15.That in 1991, during a hearing on an alleged violation by one of the bars owned, in part or in whole, or operated by Plaintiff John Hamilton, an incident occurred wherein Assistant Attorney General Richard Rubin, assigned by the Attorney General to assist in the administrative hearings regarding alleged MLCC liquor control violations, was caught instructing a defense witness to avoid administrative subpoena and not appear on behalf of the bar and Plaintiff John Hamilton for the conclusion of the administrative hearing in an attempt to prevent Plaintiff John Hamilton, from establishing that a liquor control violation had not occurred.

16.That Plaintiff, John Hamilton, communicated Mr. Rubin's conduct to the MLCC and to the Attorney General. At that time, Assistant Attorney General Arthur D'Hondt was Mr. Rubin's superior in the Attorney General's office. Mr. D'Hondt agreed that Mr. Rubin would not, at any time in the future, participate in any hearing involving alleged liquor control violations by any bar or adult entertainment facility owned or operated by Plaintiffs.

17.That upon information and belief, after Plaintiff's complaint regarding Rubin, Rubin and D'Hondt met with Perry, et al, acting in their individual capacities, with the exception of Arthurhultz, and each, individually, agreed and conspired to deprive Plaintiff, John Hamilton, under color of law, of his right to maintain employment

with the various bars and adult entertainment facilities with liquor licenses that he owned or in which he was an investor, to take, seize and destroy Plaintiffs' corporate investments, rendering same financially unstable, and take, seize and destroy the individual property rights of John Hamilton to own a liquor license in the State of Michigan, or to invest, above 9% in a corporation that owns a liquor license or to purchase a restaurant, bar or facility that owned a liquor license in the State of Michigan and to deny him equal protection and substantive and procedural due process contrary to Article I §2 and §17 of the Michigan Constitution of 1963 and contrary to the Fifth and Fourteenth Amendments of the United States Constitution.

18.That upon information and belief, in furtherance of the agreement and conspiracy, Perry, et al, by abuse of position instituted a policy, custom, design and practice, through the Defendant Unknown Enforcement Agents to destroy, take and seize Plaintiffs' property rights, deny him substantive and procedural due process.

19.That the policy, custom, design, and practice to take, seize and destroy Hamilton's property without hearing or substantive or procedural due process included, but was not limited to, the following:

(A) creating false liquor control violations against establishments owned or operated by John Hamilton and/or entice, threaten or coerce independent contractors renting the use of Hamilton's facilities to commit liquor control violations;

(B) harassing Hamilton's family;

(C) communicating and publishing false information regarding John Hamilton and the corporations with which he is employed and/or in which he is an investor;

(D) consulting, cooperating, assisting, and promoting business competitors to further their business interests and to have the competitors such as Sweats encourage dancers not to utilize Hamilton's facilities or make public statements derogatory to

Hamilton and his business;
(E) harass customers that frequent or attend one of Hamilton's bars.
20.That Plaintiffs are informed and believe, that immediately thereafter, in furtherance of the conspiracy and agreement, D'Hondt contacted the Lincoln Park office of the MLCC and informed the MLCC agents and the assistant attorney generals assigned to that office to "show John Hamilton who is boss."
21.That presently, and at all times mentioned since 1991, Plaintiff John Hamilton, together with his wife, has been the sole stockholder of four (4) corporations with Michigan liquor licenses including but not limited to: Hamilton's Bogarts, Inc. and Henry the VIII Lounge, Inc. Under Michigan law, forfeiture of a liquor license for violation of the Michigan Liquor Control Act by any of the four corporations would prohibit John Hamilton from obtaining a new liquor license to open an new bar or facility and any action against the corporation and any illegal action designed to destroy the corporation and result in the forfeiture of the liquor license by the MLCC of any of the four corporations directly affects the personal interests of John Hamilton and is not a derivative action.
22.That the four aforementioned corporations, Hamilton's Bogart, Inc., etc, are adult entertainment facilities that serve alcoholic beverages. The adult entertainers at these corporations are independent contractors who pay to the corporation a fee for the right to use or share the use of the facility with other independent contractors for a limited period of time each day.
23.That upon information and belief, in furtherance of the conspiracy to deprive Plaintiff of his property rights and substantive and procedural due process, Perry, et al, with the exception of Arthurhultz, contacted Defendant Unknown MLCC Enforcement Agents and instructed these agents to infiltrate and conduct surveillance on the bars owned by Plaintiff Hamilton and to institute the policy more fully described in paragraph 19 of this Complaint. These agents were instructed to contact the

aforementioned independent contractors and entice or entrap the independent contractors to commit violations of the Michigan Liquor Control Act so as to place the corporate liquor license in jeopardy and to deny Plaintiff Hamilton the personal and individual right of owning a liquor license and to harass, intimidate and threaten the independent contractors and employees of the corporation with alleged violations of the law, to harass customers of Hamilton's various businesses, to communicate and publish false information regarding Hamilton, and to assist and promote Hamilton's competitors.

24. That at the same time as the Defendant Unknown MLCC Agents were threatening, intimidating, harassing, enticing or entrapping the independent contractors and employees for alleged misconduct former MLCC Liquor Control Commissioner and Alex Laggis was instructing and advising Plaintiff Hamilton that certain conduct, i.e. "lap dancing" was permissible and then Defendant Unknown Agents of Defendants Perry et al, would issue liquor control violations against the corporation for the conduct approved by Commissioner Laggis.

25. That upon information and belief, the Defendant Unknown MLCC Enforcement Agents enlisted the services of Defendant Edward Carravallah and other Unknown Wayne County Deputy Sheriffs and other law enforcement officers to participate in the conspiracy.

26. That upon information and belief, the Defendant Unknown MLCC Enforcement Agents, Deputy Carravallah and the Unknown Deputy Sheriffs together with other unknown law enforcement officers proceeded to entice, entrap, intimidate and harass independent contractors performing at Plaintiff's corporations and the MLCC enforcement agents, unknown law enforcement officers and deputies and the administrative staff of the MLCC withheld from Plaintiff the names of the independent contractors that allegedly violated purported MLCC regulations and did not notify the corporations or Plaintiff of the alleged violations for substantial

periods of time so as to prevent Plaintiff from ascertaining the true identity of the independent contractors and presenting evidence in favor of the corporation regarding the alleged violations denying Plaintiff and his corporations substantive and procedural due process and effectively obstructing justice.

27.That upon information and belief, the Defendant Unknown MLCC Enforcement Agents, Deputy Carravallah and the Unknown Deputy Sheriffs together with other unknown law enforcement officers instituted the custom, policy, design and practice established by Defendants Perry, et al as more fully set forth in paragraph 19 .

28. That in 1995, Defendant Arthurhultz became an employee of the MLCC and joined the conspiracy.

29. That in 1995, Jeremy Hamilton, and John Hamilton, Jr., sons of John Hamilton, sought to purchase a resort, bar, and adult entertainment facility in Dayton Township, Tuscola County, State of Michigan.

30. That Arthurhultz, Perry, et al, as an overt act in furtherance of the conspiracy to deprive Hamilton of substantive and procedural due process and to take, seize and destroy his property interests including his reputation and family relationship, denied Jeremy Hamilton and John Hamilton, Jr. permission to obtain the liquor license and permits because of their relationship to their father and step mother and orally and in writing defamed Plaintiff John Hamilton accusing him of unlawful conduct.

31.That upon information and belief, Defendants Arthurhultz, Perry, et al, and the Defendant Unknown MLCC Enforcement Agents maintained raw intelligence files regarding licensees but did not disclose to the licensees the nature of the material contained therein.

32. That upon information and belief, Defendants Arthurhultz, Perry, et al, and Unknown Agents, as an overt act and in furtherance of the conspiracy, communicated, orally or in writing, this "raw intelligence data" which consists of hearsay, speculation

and conclusion, to third parties with reckless disregard for the truth, in an attempt to deprive Hamilton of his property without hearing or substantive and procedural due process.

33.That upon information and belief, Defendants Arthurhultz, Perry, et al, and the Defendant Unknown Enforcement Agents at all times mentioned herein, have communicated and published raw intelligence data regarding Plaintiff John Hamilton with reckless disregard for the truth and defamed him by accusing him of various acts of misconduct although said allegations are false.

34. That upon information and belief, in 1995 or at the latest in 1996, Assistant Wayne County Prosecuting Attorney Larry Roberts joined the conspiracy to violate Plaintiff's constitutional rights. Mr. Roberts was acting, at all times mentioned herein, in an administrative or investigatory capacity or as a political campaigner on behalf of the Wayne County Prosecutor, John O'Hair and not in pursuit of pending criminal litigation or in a quasi-judicial capacity.

35. That Roberts, in his administrative and political capacity, as an overt act in furtherance of the conspiracy, developed a relationship with Ronald and Lydia Sweat, individually and jointly, and encouraged them to publicly harass John Hamilton and his bars.

36. That Ronald and Lydia Sweat, jointly and individually, joined the conspiracy to deprive Hamilton of his property and destroy his business without substantive or procedural due process.

37. That Roberts enlisted Ronald and Lydia Sweat, individually and jointly, as his agents to publicly and privately speak against John Hamilton, to assist in the creation of false allegations of liquor control violations and damage Hamilton's reputation.

38. That Ronald and Lydia Sweat, acting under the color of law and in conjunction with Larry Roberts and the other Defendants, committed the following, but not limited to overt acts in furtherance of the conspiracy to deprive Hamilton of his property and destroy his reputation without due process:

(A) utilized the services of Farvway, an unlicensed Michigan

corporation, to conduct so called investigations and spy on John Hamilton and his corporations;
(B) promoted, solicited, assisted, and communicated to third parties fabricated allegations of liquor control violations by Hamilton and occurring at his corporation;
(C) issued public communications, in writing and verbally attacking Hamilton and his businesses.
39.That, upon information and belief, Roberts, knowingly and intentionally, encouraged Sweats to utilize the services of Farvway, or, alternatively, ignored Sweats' use of Farvway although Roberts knew or should have known that he was promoting a violation of law because Farvway was not properly licensed to conduct private investigations or act as a private security agency. Further, as an overt act, Roberts, or those acting on his behalf, met with the unknown officers and employees of Farvway and solicited and promoted their unlawful activities in order to deprive Plaintiff of his property without substantive or procedural due process.
40. That unknown employees and officers of Farvway agreed with Defendants to join the conspiracy to take, seize and destroy Hamilton's business and reputation without due process of law.
41.That Defendants Sweat and the unknown officers and employees of Farvway, in furtherance of the conspiracy, proceeded to illegally surveil and harass the customers, independent contractors, employees, and public officials associated with Plaintiff John Hamilton and his bars.
42. That Plaintiffs are informed and believe that in April, 1996, Defendants Roberts, Carravallah, Unknown MLCC Enforcement Agents and Deputy Sheriffs held a meeting in Wayne County wherein the deputies were informed and instructed to "shut the untouchable John Hamilton down" by any means.
43. That during the last week of May or the first week of June, 1996, one of the Defendant deputies communicated to Plaintiff John Hamilton that Defendant Robert, Unknown MLCC Enforcement Agencies and his superiors in the Wayne County Sheriff's

Department had advised Defendant Unknown Deputy Sheriffs to write liquor control violations on the establishments owned by Plaintiff John Hamilton "whether or not in fact there was a violation". In other words, Defendants, in furtherance of the conspiracy to deprive Plaintiff of his property rights and to deny him equal protection under the law to force him from business were going to allege MLCC or criminal violations regardless of the existence of such violation in a subversion of both criminal and civil due process.

44. That Plaintiff, John Hamilton, is informed and believes that Defendant Larry Roberts, in furtherance of the conspiracy, instructed subordinate prosecutors to enhance charges against independent contractors performing at Hamilton's corporations whenever possible, although enhancement would not be justified or comparable to other litigation in Wayne County as exemplified by the actions taken in a criminal case pending against dancers of Jo-Bet, Inc., where, after the dancers had been arraigned and were facing trial, charges were enhanced against the dancers without notification or motion from a simple to high misdemeanor in order to deprive Plaintiff John Hamilton of his license and threaten his financial investments.

45. That further, Plaintiff is informed and believes that Defendants have caused literally dozens of Hamilton's bar patrons to be harassed by sham traffic stops under the pretext that the patron of Hamilton's bar was driving too close to the white line or exceeding the speed limit or the car was wobbling when it had a flat tire, force the patrons to submit to alcohol examinations and released without citation or formal police record in an attempt to financially injure Hamilton and deprive him of his property without substantive or procedural due process.

46. That Defendants, acting in concert and in furtherance of a conspiracy, under color of law, under custom, policy and design, have deprived Plaintiff of his fundamental right to buy or purchase property, his right to maintain employment, his right to maintain

and own property, substantive and procedural due process contrary to Article I Section 2 and 17 and Article of the Michigan Constitution of 1963, and contrary to the Fifth and Fourteenth Amendments of the United States Constitution.

47. That as a direct and proximate result of the conspiracy and concerted actions of Defendants, and as a overt act in furtherance of the conspiracy, John, Jr. and Jeremy Hamilton were deprived of an opportunity to purchase a bar, motel, and resort in Tuscola County, State of Michigan.

48. That thereafter, Jeremy and John Hamilton, Jr. located a bar for sale in the metropolitan Detroit area which they purchased with the use of trust funds. Unlike the Tuscola County situation, neither John nor Betty Hamilton loaned money to Jeremy or John Hamilton, Jr. to purchase the bar.

49. That when the State issued approval for the transfer of the liquor license from the prior owner to John and Jeremy Hamilton, Defendants Arthurhultz, Perry, et al, as an overt act in furtherance of the conspiracy, listed on the license transfer approval, a condition that neither John nor Betty Hamilton could assist John, Jr. or Jeremy Hamilton in the operation or management of the bar even as a volunteer, although Plaintiff John Hamilton has never been convicted of a felony and maintains four existing liquor licenses.

50. That the actions of Defendants will continue until they have succeeded in destroying Plaintiff's businesses forfeiting the existing liquor licenses and prohibiting Plaintiff, individually from owing a liquor license in the State of Michigan and will continue until such time as Defendants have destroyed Plaintiff's reputation, individually and jointly.

51. That the damage to Plaintiff's reputation and the illegal acts of Defendants will continue causing Plaintiff irreparable harm if Defendants are not permanently enjoined from continuing their illegal and improper violation of Plaintiff's constitutional rights.

52.That money damages are not sought against MLCC as same is

immune from suit for money damages under the Eleventh Amendment of the United States Constitution and, Bogarts is not a plaintiff in this count as the corporation is not a person for 42 USC §1983 violations.

WHEREFORE Plaintiffs pray:

(1) for a judgment against each and all of the Defendants in favor of John Hamilton, not Bogarts in excess of $50,000.00 plus costs, interest and attorneys fees; and

(2) for a permanent injunction enjoining Defendants from further violation of Plaintiffs' constitutional property rights, right to substantive and procedural due process and right to equal protection.

COUNT II - 42 USC §1985

53. That Plaintiffs incorporate by reference paragraphs 1-52 of this Complaint as more fully set forth herein.

54. That at all times mentioned herein, Defendants conspired to deprive Plaintiff, John Hamilton, of equal protection contrary to the 14th Amendment of the U.S. Constitution.

55. That upon information and belief, Defendants Perry, et al, together with the Defendant Unknown MLCC Enforcement Agents instructed assistant attorney generals assigned to the MLCC to deny Plaintiffs equal protection in administrative hearings as compared to all other bar owners and/or investors similarly situated. If another bar owner or corporation with a similar or worse violation record than Plaintiffs were charged with a similar or worse offense than alleged against Plaintiff, Defendant Enforcement Agents and the assistant attorney generals were instructed to seek forfeiture of Plaintiff's liquor license while fining or criticizing those similarly situated

56. That upon information and belief and in furtherance of the agreement conspiracy, Defendants instituted a policy, custom, design and practice, as more fully set forth in paragraph 19, to deny Plaintiff John Hamilton, equal protection under the law.

57.That, upon information and belief, Defendants Arthurhultz, Perry, et al, and unknown MLCC enforcement agents Carravallah and unknown Wayne County Deputies while seeking to destroy Plaintiff John Hamilton's businesses and his reputation, have punished adult bar owners for liquor control violations which bar owners had egregious liquor control violation records with minimal fines or have afforded new licenses to convicted felons or allowed the felons to maintain liquor control licenses, while depriving the Hamilton family of a license merely because of a blood relationship.

58. That, upon information and belief, Defendant Roberts, for political and/or administrative reasons and/or for his own promotion has sought to deny Plaintiff equal protection for the reasons set forth above and has utilized unlawful means such as using an unlicensed investigator, to attack, take, seize, and destroy Hamilton's business and deny him equal protection.

59. That, upon information and belief, the unknown officers and employees of Farvway and the Sweats, at all times mentioned herein, have functioned as the agents and under the authority of Defendant Larry Roberts, Edward Carravallah and the other Defendants seeking to destroy, take, and seize Plaintiff's businesses and his reputation and to deprive Hamilton of equal protection.

60. That, upon information and belief, Defendants Arthurhultz, Perry, et al, Roberts, Carravallah, unknown Wayne County Deputies and MLCC enforcement agents have utilized threats, harassment, intimidation directed at patrons, customers, employees and independent contractors associated with Hamilton including but not limited to unlawful searches and seizures, communications, and invasion of privacy to destroy Hamilton's businesses and deny him equal protection under the law and Defendants Sweat and the unknown officers and employees of Farvway have willingly, knowingly, and intentionally assisted Defendants as their agents in the endeavor to deprive Hamilton of equal protection.

61.That, upon information and belief, Defendants Arthurhultz,

Perry, et al, Roberts, Carravallah, unknown Wayne County Deputies and MLCC enforcement agents have interfered with, tainted, and abused their public and private positions by such actions but not limited to causing false liquor control violations to be issued against Hamilton's businesses in order to take, seize and destroy Hamilton's businesses and deny Hamilton equal protection of the law.

WHEREFORE Plaintiffs pray:

(1) for a judgment against each and all of the Defendants in favor of John Hamilton, not Bogarts in excess of $50,000.00 plus costs, interest and attorneys fees; and

(2) for a permanent injunction enjoining Defendants from further violation of Plaintiffs' constitutional property rights, right to substantive and procedural due process and right to equal protection.

COUNT III - 28 USC §2201

62. That Plaintiffs incorporate by reference paragraphs 1-61 of this Complaint as more fully set forth herein.

63. That the First Amendment of the United States Constitution provides for freedom of speech and freedom of association and the Fourteenth Amendment of the United States Constitution provides that the First Amendment apply to the states and insures due process and equal protection.

64. That exotic dancing has historically been classified as a form of protected speech, whether topless or otherwise.

65. That MLCC Rule 436.1411 provides: "An on premises licensee shall not allow in or upon the licensed premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus."

66. That if the foregoing regulation applies to Bogarts and Jo-Bet, it applies to all liquor licensees.

67. That upon information and belief, Arthurhultz, Perry and Pulliam have further stated that groin to groin contact between a

man and a woman in a motion simulating sexual intercourse is permissible conduct in licensed establishments that serve alcoholic beverages except in "topless bars". They have further stated that a female siting on a male's lap is permissible conduct except in "topless bars". In application of the aforementioned regulation, a dual standard is applied denying Plaintiffs Bogarts and Jo-Bet equal protection under the law and violation of the Fourteenth Amendment.

68. That upon information and belief, Arthurhultz, Perry and Pulliam have stated that "lap dancing" is permissible in a country/western or top-40 bar but not in a "topless bar" such as Bogarts although lap dancing is lap dancing. The aforementioned MLCC regulation, as applied by Arthurhultz, et al, and as written, is void for vagueness and overly broad, denying Plaintiffs, John Hamilton, Hamilton's Bogarts, Inc., and Jo-Bet, Inc., due process, substantive and procedural, in violation of the Fourteenth Amendment and the dual application and definitions, fail to inform a licensee as to what constitutes "simulated sexual intercourse" thus denying them equal protection under the law.

69. That upon information and belief, Arthurhultz, Perry et al, have approved various forms of social dancing and interpersonal conduct in licensed established other than topless bars such as Bogarts or Jo-Bet but claims that such acts constitute a violation of MLCC regulations when performed at Bogarts or Jo-Bet. Defendant Stewart has stated that mere hand-leg contact by a dancer while performing at Bogarts or Jo-Bets constitutes some form of masturbation or illegal sexual activity under the aforementioned regulation although the same act can be performed by a ballet dancer, whether topless or not in a licensed establishment not considered to be a topless bar.

70. That upon information and belief, Defendants Arthurhultz, Perry and Pulliam, under the Regulation, have instructed that any physical movement that may be subject to multiple interpretations such as gyrating of the pelvis or stroking an 8 foot brass pole

constitutes a simulated sexual act and is prohibited clearly violating the dancers' freedom of expression and communication. Plaintiffs believe that Defendants Arthurhultz, Perry and Pulliam have gone so far as to state that if two (2) dancers look at one another said act of looking violates the Regulation.

71. That the same conduct performed by a female topless dancer at Bogarts or Jo-Bet is permitted by a male topless dancer in another establishment, sexually discriminating against the female performers renting Bogarts' or Jo-Bet's facilities and Plaintiff, John Hamilton, on behalf of Bogarts and Jo-Bet, in which he is a stockholder, director and officer, asks this Court to declare the aforestated regulation to be unconstitutional, a violation of the First Amendment right of free speech, sexually discriminating, void for vagueness and overbreadth and as applied to Bogarts and Jo-Bet in particular a denial of equal protection. Further, as applied to John Hamilton, Defendants are interfering with his right of association, right of employment, and denying John Hamilton equal protection.

72. That continued application of a dual standard and the vague regulation, which is susceptible to multiple political interpretations, threatens the very existence of Bogarts and Jo-Bet and unless enjoined will cause irreparable harm to Bogarts and Jo-Bet and John Hamilton personally as set forth above, and Plaintiffs have no legal remedy.

73. That as set forth above, John Hamilton has interests independent of Hamilton's Bogarts, Inc. or Jo-Bet, Inc. and the other corporations in which he is a stockholder. As set forth above, there exists a scheme, plan, and design, in the form of a conspiracy and in the form of a concerted action, to divest John Hamilton of his property interests and right to own a liquor license and to destroy Bogarts and Jo-Bet and forfeit their licenses. The method to achieve this end is through the enforcement of the vague and ambiguous MLCC Regulation 436.1411 and the denial of equal protection.

74. That Plaintiffs have no legal remedy to protect their

constitutional interests and will be irreparably harmed absent injunctive relief and a declaration by this Court that the Regulation is vague and ambiguous and/or that the Regulation is being unequally applied to Plaintiffs and such enforcement of the Regulation enjoined.

WHEREFORE, Plaintiffs pray for a declaratory judgment seeking a permanent injunction against enforcement of MLCC Regulation 436.1411 by Defendants Arthurhultz, Perry and others and asks that the Regulation be void.

Dated: _____ _____

John Hamilton

State of Michigan)
) ss
County of Wayne)

Sworn and subscribed before me on this ___ day of _____, 1997.

_____

, Notary Public
Wayne County, Michigan
My Commission Expires:

a:\rober-us.co3

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN L. HAMILTON,
HAMILTON BOGARTS, INC., A Michigan Corporation, and
JO-BET, INC., a Michigan corporation.

File No:
Hon.

Plaintiffs,

v

LARRY ROBERTS, PHILLIP ARTHURHULTZ, MAXINE L. PERRY, SEYMOUR E. PODOLSKY, BETTY E. PULLIAM, JACQUELYN A. STEWART, THOMAS A. VANTIEM, UNKNOWN MICHIGAN LIQUOR CONTROL ENFORCEMENT AGENTS, EDWARD CARRAVALLAH, and UNKNOWN WAYNE COUNTY DEPUTY SHERIFFS.

Defendants.

_____/

Sempliner, Thomas & Boak
Attorneys for Plaintiff
BY: John E. Thomas (P21378)
711 West Ann Arbor Trail
Plymouth MI 48170-1677
(313) 455-4560

_____/

VERIFIED COMPLAINT

NOW COME PLAINTIFFS, John Hamilton, Hamilton Bogarts, Inc., and Jo-Bet, Inc., by and through their attorneys, Sempliner, Thomas and Boak, pursuant to 42 USC §1983 and 28 USC §2201 et seq. and shows unto this Honorable Court as follows:

1. That jurisdiction is based on 28 USC §1331 and §1343 and founded on the existence of a federal question arising under 42 USC §1983, with the amount in controversy, exclusive of interest and costs, exceeding the sum of $50,000.00 and a federal question arising under the Fourteenth Amendment of the United States Constitution and 28 USC §2201 seeking a declaratory judgment that Michigan Liquor Control Commission Regulation 436.1411 violates the First and Fourteenth Amendments of the United States Constitution and denies fundamental due process and equal protection, and is constitutionally vague and overly broad in application and interpretation.

2. That Plaintiff, John Hamilton is a resident of Wayne County, State of Michigan. Hamilton Bogarts, Inc. ("Bogarts") is a Michigan corporation duly incorporated in the State of Michigan with its principal offices in Wayne County, State of Michigan, and Jo-Bet, Inc., ("Jo-Bet") is a Michigan corporation duly incorporated in the State of Michigan with its principal offices in Wayne County, State of Michigan.

3. That Defendant, Larry Roberts, ("Roberts") is an assistant prosecuting attorney for the County of Wayne, State of Michigan.

4. That Defendants Maxine L. Perry, Seymour E. Podolsky, Betty E. Pulliam, Jacquelyn A. Stewart, and Thomas VanTiem ("Perry, et al") are each employees of the Michigan Liquor Control Commission ("MLCC"), acting in their personal, individual capacities under the color of law.

5. That Defendant Philip Arthurhultz ("Arthurhultz") is an employee of the MLCC.

6. That the unknown Michigan Liquor Control Enforcement Agents ("Agents") are employed at or associated with the Lincoln Park or

Lansing, Michigan offices of the MLCC and assigned to enforce policy, customs and designs of the MLCC and its administrators.

7. That Edward Carravallah and the unknown Wayne County Deputy Sheriffs ("Deputies") are residents of Wayne County, State of Michigan, and are agents and employees of the Wayne County Sheriff, State of Michigan.

8. That assigned to the MLCC, by the Attorney General of the State of Michigan, are several assistant attorney generals who maintain offices in the space or complexes established for the MLCC. In other words, the assistant attorney general's function in the offices where the MLCC administrators and agents function and effectively take direction from the MLCC.

COUNT I - 42 USC §1983

9. That plaintiffs incorporate by reference paragraphs 1-8 of this Complaint as if fully set forth herein.

10. That for the past 28 years, Plaintiff John Hamilton has owned, personally, individually with his wife, or as an individual investor, numerous bars and adult entertainment facilities in and about the metropolitan Detroit area under various licenses and permits issued by the MLCC or operated or were employed by said bars and facilities, without significant problems or disputes with the MLCC until 1991.

11. That it is the function of the MLCC to regulate and administer the sale and manufacture of intoxicating liquor in the State of Michigan and included in its function is periodic supervision of each business, corporation, partnership or individual that is involved in the sale or manufacture of intoxicating beverages. Periodic inspections by the MLCC, particularly of bars or restaurants, do, from time to time, result in a claim by a MLCC enforcement agent that a particular bar has violated an MLCC regulation.

12. That under the procedure established by the MLCC, if a violation is claimed by an enforcement agent of the MLCC, the licensee is entitled to an administrative hearing on the alleged

violation.

13. That in 1991, during a hearing on an alleged violation by one of the bars owned, in part or in whole, or operated by Plaintiff John Hamilton, an incident occurred wherein Assistant Attorney General Richard Rubin, assigned by the Attorney General to assist in the administrative hearings regarding alleged MLCC liquor control violations, was caught instructing a defense witness to avoid administrative subpoena and not appear on behalf of the bar and Plaintiff John Hamilton for the conclusion of the administrative hearing in an attempt to prevent Plaintiff John Hamilton, from establishing that a liquor control violation had not occurred.

14. That Plaintiff, John Hamilton, communicated Mr. Rubin's conduct to the MLCC and to the Attorney General. At that time, Assistant Attorney General Arthur D'Hondt was Mr. Rubin's superior in the Attorney General's office. Mr. D'Hondt agreed that Mr. Rubin would not, at any time in the future, participate in any hearing involving alleged liquor control violations by any bar or adult entertainment facility owned or operated by Plaintiffs.

15. That upon information and belief, after Plaintiff's complaint regarding Rubin, Rubin and D'Hondt met with Perry, et al, acting in their individual capacities, with the exception of Arthurhultz, and each, individually, agreed and conspired to deprive Plaintiff, John Hamilton, under color of law, of his right to maintain employment with the various bars and adult entertainment facilities with liquor licenses that he owned or in which he was an investor, to take, seize and destroy Plaintiffs' corporate investments rendering same financially unstable and take, seize and destroy the individual property rights of John Hamilton to own a liquor license in the State of Michigan, or to invest, above 9% in a corporation that owns a liquor license or to purchase a restaurant, bar or facility that owned a liquor license in the State of Michigan and to deny them equal protection and substantive and procedural due process contrary to Article I §2 and §17 of the Michigan Constitution of 1963 and contrary to the Fifth and Fourteenth Amendments of the

United States Constitution.

16. That upon information and belief, in furtherance of the agreement and conspiracy, Perry, et al, by abuse of position instituted a policy, custom, design and practice, through the Defendant Unknown Enforcement Agents to destroy Plaintiffs' property rights, deny them equal protection and deny them substantive and material due process.

17. That Plaintiffs are informed and believe, that immediately thereafter, in furtherance of the conspiracy and agreement, D'Hondt contacted the Lincoln Park office of the MLCC and informed the MLCC agents and the assistant attorney generals assigned to that office to "show John Hamilton who is boss."

18. That the actions of Rubin, D'Hondt, Perry, Stewart, et al, and the unknown MLCC enforcement agents is contrary to the intent, purpose and design, of MCL 436.1 et seq.; MSA 18.971 et seq. and by analogy, contrary to the intent of MCL 15.361 et seq; MSA 17.428(1) et seq. the Michigan "Whistleblowers Protection Act" ("WPA")

19.That presently, and at all times mentioned since 1991, Plaintiff John Hamilton, together with his wife, has been the sole stockholder of four (4) corporations with Michigan liquor licenses including but not limited to: Hamilton's Bogarts, Inc. and Henry the VIII Lounge, Inc. Under Michigan law, forfeiture of a liquor license for violation of the Michigan Liquor Control Act by any of the four corporations would prohibit John Hamilton from obtaining a new liquor license to open an new bar or facility and any action against the corporation and any illegal action designed to destroy the corporation and result in the forfeiture of the liquor license by the MLCC of any of the four corporations directly affects the personal interests of John Hamilton and is not a derivative action.

20. That the four aforementioned corporations, Hamilton's Bogart, Inc., etc, are adult entertainment facilities that serve alcoholic beverages. The adult entertainers at these corporations are independent contractors who pay to the corporation a fee for the

right to use or share the use of the facility with other independent contractors for a limited period of time each day.

21. That upon information and belief, in furtherance of the conspiracy to deprive Plaintiff of his property right and equal protection, Perry, et al, with the exception of Arthurhultz, contacted Defendant Unknown MLCC Enforcement Agents and instructed these agents to infiltrate and conduct surveillance on the bars owned by Plaintiff Hamilton. On information and belief, these agents were instructed to contact the aforementioned independent contractors and entice or entrap the independent contractors to commit violations of the Michigan Liquor Control Act so as to place the corporate liquor license in jeopardy and to deny Plaintiff Hamilton the personal and individual right of owning a liquor license and to harass, intimidate and threaten the independent contractors and employees of the corporation with alleged violations of the law toward that end.

22. That at the same time as the Defendant Unknown MLCC Agents were threatening, intimidating, harassing, enticing or entrapping the independent contractors and employees for alleged misconduct former MLCC Liquor Control Commissioner and Alex Laggis was instructing and advising Plaintiff Hamilton that certain conduct was permissible. However, Defendant Unknown Agents issued a violation against the corporation for the conduct approved by Commissioner Laggis.

23. That upon information and belief, Defendants Perry, et al, together with the Defendant Unknown MLCC Enforcement Agents instructed assistant attorney generals assigned to the MLCC to deny Plaintiffs equal protection in administrative hearings as compared to all other bar owners and/or investors similarly situated. If another bar owner or corporation with a similar or worse violation record than Plaintiffs were charged with a similar or worse offense than alleged against Plaintiff, Defendant Enforcement Agents and the assistant attorney generals were instructed to seek forfeiture of Plaintiff's liquor license while fining

or criticizing those similarly situated.
24. That upon information and belief, the Defendant Unknown MLCC Enforcement Agents enlisted the services of Defendant Edward Carravallah and other Unknown Wayne County Deputy Sheriffs and other law enforcement officers to participate in the conspiracy.
25. That upon information and belief, the Defendant Unknown MLCC Enforcement Agents, Deputy Carravallah and the Unknown Deputy Sheriffs together with other unknown law enforcement officers proceeded to entice, entrap, intimidate and harass independent contractors performing at Plaintiff's corporations and the MLCC enforcement agents, unknown law enforcement officers and deputies and the administrative staff of the MLCC withheld from Plaintiff the names of the independent contractors that allegedly violated purported MLCC regulations and did not notify the corporations or Hamilton of the alleged violations for substantial periods of time so as to prevent Plaintiffs from ascertaining the true identity of the independent contractors and presenting evidence in favor of the corporation regarding the alleged violations denying Plaintiff and his corporations substantive and procedural due process and effectively obstructing justice.
26. That in 1995, Defendant Arthurhultz became an employee of the MLCC and on information and belief, joined the conspiracy.
27. That in 1995, Jeremy Hamilton, and John Hamilton, Jr., sons of John Hamilton, sought to purchase a resort, bar, and adult entertainment facility in Dayton Township, Tuscola County, State of Michigan.
28.That Defendants Arthurhultz, Perry, et al, together with the other Defendant Unknown MLCC Enforcement Agents denied Jeremy Hamilton and John Hamilton, Jr. permission to obtain the liquor license and permits because of their relationship to their father and step mother and orally and in writing defamed Plaintiff John Hamilton accusing him of unlawful conduct.
29.That upon information and belief, Defendants Arthurhultz,

Perry, et al, and the Defendant Unknown MLCC Enforcement Agents maintained raw intelligence files regarding licensees but did not disclose to the licensees the nature of the material contained therein.

30.That upon information and belief, Defendants Arthurhultz, Perry, et al, and Unknown Agents communicate, orally or in writing, this "raw intelligence data" which consists of hearsay, speculation and conclusion, to third parties with reckless disregard for the truth and utilize this raw data in determining how it will approach a liquor control licensee and how it will punish for possible violation a licensee.

31.That upon information and belief, Defendants Arthurhultz, Perry, et al, and the Defendant Unknown Enforcement Agents at all times mentioned herein, have communicated and published raw intelligence data regarding Plaintiff John Hamilton with reckless disregard for the truth and defamed him by accusing him of various acts of misconduct although said allegations are false.

32.That upon information and belief, the Defendants enlisted the assistance of Assistant Prosecuting Attorney Larry Roberts in the furtherance of its policy, custom and design, to violate Plaintiff's constitutional property rights. Mr. Roberts was acting, at all times mentioned herein, in an administrative or investigatory capacity or as a political campaigner on behalf of the Wayne County Prosecutor, John O'Hair and not in pursuit of pending criminal litigation or in a quasi-judicial capacity.

33. That Plaintiffs are informed and believe that in April, 1996, Defendants Roberts, Carravallah, Unknown MLCC Enforcement Agents and Deputy Sheriffs held a meeting in Wayne County wherein the deputies were informed and instructed to "shut the untouchable John Hamilton down" by any means.

34. That during the last week of May or the first week of June, 1996, one of the Defendant deputies communicated to Plaintiff John Hamilton that Defendant Robert, Unknown MLCC Enforcement Agencies and his superiors in the Wayne County Sheriff's

Department had advised Defendant Unknown Deputy Sheriffs to write liquor control violations on the establishments owned by Plaintiff John Hamilton "whether or not in fact there was a violation". In other words, Defendants, in furtherance of the conspiracy to deprive Plaintiff of his property rights and to deny him equal protection under the law to force him from business were going to allege MLCC or criminal violations regardless of the existence of such violation in a subversion of both criminal and civil due process.

35. That Plaintiff, John Hamilton, is informed and believes that Defendant Larry Roberts, in furtherance of the conspiracy, instructed subordinate prosecutors to enhance charges against employees of the Hamilton corporations whenever possible, although enhancement would not be justified or comparable to other litigation in Wayne County as exemplified by the actions taken in a criminal case pending against dancers of Jo-Bet, Inc., where, after the dancers had been arraigned and were facing trial, charges were enhanced against the dancers without notification or motion from a simple to high misdemeanor in order to deprive Plaintiff John Hamilton of his license and threaten his financial investments.

36. That Defendants, acting in concert and in furtherance of a conspiracy, under color of law, under custom, policy and design, have deprived Plaintiff of his fundamental right to buy or purchase property, his right to maintain employment, his right to maintain and own property, to obtain equal protection, substantive and procedural due process contrary to Article I Section 2 and 17 and Article of the Michigan Constitution of 1963, and contrary to the Fifth and Fourteenth Amendments of the United States Constitution.

37. That as a direct and proximate result of the conspiracy and concerted actions of Defendants, John, Jr. and Jeremy Hamilton were deprived of an opportunity to purchase a bar, motel, and resort in Tuscola County, State of Michigan.

38. That thereafter, Jeremy and John Hamilton, Jr. located a bar for

sale in the metropolitan Detroit area which they purchased with the use of trust funds. Unlike the Tuscola County situation, neither John nor Betty Hamilton loaned money to Jeremy or John Hamilton, Jr. to purchase the bar.

39. That when the State issued approval for the transfer of the liquor license from the prior owner to John and Jeremy Hamilton, Defendants Arthurhultz, Perry, et al, further displayed their bias and prejudice toward Plaintiff John Hamilton by listing on the license transfer approval a condition that neither John nor Betty Hamilton could assist John, Jr. or Jeremy Hamilton in the operation or management of the bar even as a volunteer, although Plaintiff John Hamilton has never been convicted of a felony and maintains four existing liquor licenses.

40 That the actions of Defendants will continue until they have succeeded in destroying Plaintiff's businesses forfeiting the existing liquor licenses and prohibiting Plaintiff, individually from owing a liquor license in the State of Michigan and will continue until such time as Defendants have destroyed Plaintiff's reputation, individually and jointly.

41. That the damage to Plaintiff's reputation and the illegal acts of Defendants will continue causing Plaintiff irreparable harm if Defendants are not permanently enjoined from continuing their illegal and improper violation of Plaintiff's constitutional rights.

42. That money damages are not sought against MLCC as same is immune from suit for money damages under the Eleventh Amendment of the United States Constitution and, Bogarts is not a plaintiff in this count as the corporation is not a person for 42 USC §1983 violations.

WHEREFORE Plaintiffs pray:

(1) For a judgment against each and all of the Defendants in favor of John Hamilton, not Bogarts in excess of $50,000.00 plus costs, interest and attorneys fees; and

(2) for a permanent injunction enjoining Defendants from further violation of Plaintiffs' constitutional property rights, right to

substantive and procedural due process and right to equal protection.

COUNT II - 28 USC §2201

43. That Plaintiffs incorporate by reference paragraphs 1-42 of this Complaint as more fully set forth herein.

44. That the First Amendment of the United States Constitution provides for freedom of speech and freedom of association and the Fourteenth Amendment of the United States Constitution provides that the First Amendment apply to the states and insures due process and equal protection.

45. That exotic dancing has historically been classified as a form of protected speech, whether topless or otherwise.

46. That MLCC Rule 436.1411 provides: "An on premises licensee shall not allow in or upon the licensed premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus."

47. That if the foregoing regulation applies to Bogarts and Jo-Bet, it applies to all liquor licensees.

48.That upon information and belief, Arthurhultz, Perry and Pulliam have further stated that groin to groin contact between a man and a woman in a motion simulating sexual intercourse is permissible conduct in licensed establishments that serve alcoholic beverages except in "topless bars". They have further stated that a female siting on a male's lap is permissible conduct except in "topless bars". In application of the aforementioned regulation, a dual standard is applied denying Plaintiffs Bogarts and Jo-Bet equal protection under the law and violation of the Fourteenth Amendment.

49. That upon information and belief, Arthurhultz, Perry and Pulliam have stated that "lap dancing" is permissible in a country/western or top-40 bar but not in a "topless bar" such as Bogarts although lap dancing is lap dancing. The aforementioned MLCC regulation, as applied by Arthurhultz, et al, and as written, is void for vagueness and overly broad, denying Plaintiffs, John

Hamilton, Hamilton's Bogarts, Inc., and Jo-Bet, Inc., due process, substantive and procedural, in violation of the Fourteenth Amendment and the dual application and definitions, fail to inform a licensee as to what constitutes "simulated sexual intercourse" thus denying them equal protection under the law.

50. That upon information and belief, Arthurhultz, Perry et al, have approved various forms of social dancing and interpersonal conduct in licensed established other than topless bars such as Bogarts or Jo-Bet but claims that such acts constitute a violation of MLCC regulations when performed at Bogarts or Jo-Bet. Defendant Stewart has stated that mere hand-leg contact by a dancer while performing at Bogarts or Jo-Bets constitutes some form of masturbation or illegal sexual activity under the aforementioned regulation although the same act can be performed by a ballet dancer, whether topless or not in a licensed establishment not considered to be a topless bar.

51. That upon information and belief, Defendants Arthurhultz, Perry and Pulliam, under the Regulation, have instructed that any physical movement that may be subject to multiple interpretations such as gyrating of the pelvis or stroking an 8 foot brass pole constitutes a simulated sexual act and is prohibited clearly violating the dancers' freedom of expression and communication. Plaintiffs believe that Defendants Arthurhultz, Perry and Pulliam have gone so far as to state that if two (2) dancers look at one another said act of looking violates the Regulation.

52. That the same conduct upon which violations are founded when performed by a female topless dancer at Bogarts or Jo-Bet is permitted by a male topless dancer in another establishment, sexually discriminating against the female performers renting Bogarts' or Jo-Bet's facilities and Plaintiff, John Hamilton, on behalf of Bogarts and Jo-Bet, in which he is a stockholder, director and officer, asks this Court to declare the aforestated regulation to be unconstitutional, a violation of the First Amendment right of free speech, sexually discriminating, void for vagueness and

overbreadth and as applied to Bogarts and Jo-Bet in particular a denial of equal protection. Further, as applied to John Hamilton, Defendants are interfering with his right of association, right of employment, and denying John Hamilton equal protection.

53. That continued application of a dual standard and the vague regulation, which is susceptible to multiple political interpretations, threatens the very existence of Bogarts and Jo-Bet and unless enjoined will cause irreparable harm to Bogarts and Jo-Bet and John Hamilton personally as set forth above, and Plaintiffs have no legal remedy.

54. That as set forth above, John Hamilton has interests independent of Hamilton's Bogarts, Inc. or Jo-Bet, Inc. and the other corporations in which he is a stockholder. As set forth above, there exists a scheme, plan, and design, in the form of a conspiracy and in the form of a concerted action, to divest John Hamilton of his property interests and right to own a liquor license and to destroy Bogarts and Jo-Bet and forfeit their licenses. The method to achieve this end is through the enforcement of the vague and ambiguous MLCC Regulation 436.1411 and the denial of equal protection.

55. That Plaintiffs have no legal remedy to protect their constitutional interests and will be irreparably harmed absent injunctive relief and a declaration by this Court that the Regulation is vague and ambiguous and/or that the Regulation is being unequally applied to Plaintiffs and such enforcement of the Regulation enjoined.

WHEREFORE, Plaintiffs pray for a declaratory judgment seeking a permanent injunction against enforcement of MLCC Regulation 436.1411 by Defendants Arthurhultz, Perry and others and asks that the Regulation be void.

Dated: _____ _____

John Hamilton

State of Michigan)
County of Wayne)

Subscribed and sworn to before me on this 31st day of October, 1996.

_____

BARBARA J. BAKER, Notary Public
Wayne County, Michigan
My Commission Expires: 1-14-97

DRAFTED BY:
JOHN E. THOMAS P21378
STEPHEN H. BOAK 10912
Attorneys for the Plaintiffs
711 West Ann Arbor Trail
Plymouth MI 48170
313-455-4560

a:\rober-us.co2

Constitution of the United States

First Amendment Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or the right of the people peaceably to assemble, and to petition the Government of a redress of grievances.

14th Amendment Citizenship rights not to be abridged by states
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21st Amendment

§1. National liquor prohibition repealed

Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

§2. Transportation of liquor into "dry" state

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein or intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Federal Rules of Civil Procedure

Rule 26 (a) General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if know, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such compilation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part of all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

Rule 26 (f) Meeting of Parties; Planning for Discovery.

Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to made or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

Rule 56 Summary Judgment

(a) **For Claimant**. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor

upon all or any part thereof.

(b) **For Defending Party**. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon**. The motion shall be served at lease 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although three is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion**. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall e deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit

affidavits to e supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, bu the adverse party's response, by affidavits or as otherwise provided in this rule, just set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable**. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by the affidavit s facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Michigan Liquor Control Commission, 1980 Annual Administrative Code Supplement
Rule 436.1411

Explicit sexual activity prohibited; applicability to electronic reproduction.

Rule 11 (1) An on premises licensee shall not allow in or upon the licensed premises a person who performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus.

(2) An on-premise licensee shall not allow in or upon the licensed premises the showing of films, television, slides, or other electronic reproductions which depict scenes wherein a person performs, or simulates performance of, sexual intercourse, masturbation, sodomy, bestiality, fellatio, or cunnilingus. This prohibition does not apply to any publicly broadcast television transmission from a federally licensed station.